CONSIDERATION OF THE PROPOSAL FOR A UNIFORM FEDERAL PROCUREMENT SYSTEM

HEARINGS

BEFORE THE

SUBCOMMITTEE ON FEDERAL EXPENDITURES,
RESEARCH, AND RULES

OF THE

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GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST AND SECOND SESSIONS

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CONSIDERATION OF THE PROPOSAL FOR A UNIFORM FEDERAL PROCUREMENT SYSTEM

THURSDAY, DECEMBER 10, 1981

U.S. SENATE,
SUBCOMMITTEE ON FEDERAL EXPENDITURES,
RESEARCH, AND RULES,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 2:20 p.m., in room 3302, Dirksen Senate Office Building, Hon. John C. Danforth (chairman of the subcommittee) presiding.

Present: Senators Danforth, Chiles, and Levin.

Staff present: Christopher R. Brewster, chief counsel and staff director; William B. Montalto, procurement policy counsel; Robert E. Coakley, minority professional staff member; Patricia A. Otto, chief clerk; C. Lincoln Hoewing, Governmental Affairs Committee; Richard Tallman and Jeffrey A. Minsky, Subcommittee on Oversight of Government Management; and C. Douglas McDaniel, Subcommittee on Civil Service, Post Office, and General Services.

OPENING STATEMENT OF SENATOR DANFORTH

Senator DANFORTH. Today the Subcommittee on Federal Expenditures, Research, and Rules meets to consider the Office of Federal Procurement Policy's draft proposal for a uniform procurement system. This draft proposal was submitted to the Congress at the end of October. A final proposal is expected in February of next year.

Proposals to reform the Federal procurement system have been debated in Congress for years. My colleague, Senator Chiles, is a veteran of several bruising efforts to write a uniform procurement statute. None has been successful. Year after year, procurement reform has ended up in the great reform scrap heap with welfare reform, social security reform, and similar high-minded efforts.

This time we intend to see it through. With Federal deficits projected at $100 billion, the plain and simple fact of the matter is that we cannot afford a procurement system that wastes tens of billions of dollars a year.

Estimates vary, but if we can reform the Federal procurement system, we can save anywhere from $5 billion to $20 billion each year, and we can do it without cutting back on the goals or objectives of a single Government program. For this reason, I expect OMB and the White House to be as tough in fighting for procurement reform as they have been in the fight for tax and budget cuts.

Having said this, I have a few comments on the OFPP proposal we will consider today.

First, I think it is very important for OFPP to play the central policymaking role in the administration of the procurement system, including oversight of the procurement functions of the Department of Defense. Somebody has to call the shots—and in my view, OFPP is the organization to do the job. As the administration develops its proposal, I will look for OFPP to play the central role in establishing procurement policy. Frankly, if the Office of Federal Procurement Policy does not have the necessary tools to police the procurement system, then there is not much point in having an Office of Federal Procurement Policy.

Second, I see nothing to be gained by changing OFPP's position as a statutory office, within OMB, directed by an administrator who is appointed by the President and confirmed by the Senate. Proposals to put OFPP within GSA or within the Department of Defense simply make no sense to me. They can only weaken the mission of the office.

Finally, I want to say that there is no overestimating the importance of this reform effort. We need to move on these reforms, and we need to move quickly. By all accounts, the draft proposal is a good one. I hope the administration is prepared to strengthen it and to fight for it.

I look forward to today's testimony.

Senator Chiles?

OPENING STATEMENT OF SENATOR CHILES

Senator Chiles. Mr. Chairman, I have a schedule conflict and I am not going to be able to stay, but I want to make three brief comments.

First, I want to compliment you for pursuing procurement reform. I look forward to working with you. You well know the subject is not too sexy and progress can be slow.

Second, I want to welcome Don Sowle to the trenches. I first met Don when I got involved in this issue in 1971, as a member of the Procurement Commission. He was the director of Commission studies. He was right with us when we first passed the Office of Federal Procurement Policy Act in the Nixon administration, and I think he is a good man to bring about finally a single procurement system, the Commission's No. 2 recommendation.

My last point relates to the proposal before us today. Federal procurement amounts to $110 billion a year. Consolidating the two separate statutes for Defense and the civil agencies and getting rid of the cobwebs in procurement can save us at least 5 to 10 percent of that $110 billion. That's from $5 billion to $11 billion annually. When I think they are planning 2-week furloughs against the war on drugs at the Drug Enforcement Administration because of the lack of funds, I get real anxious to see us make these kinds of savings.

We are talking about eliminating waste of billions of dollars. The proposal should be high on the administration's list of priorities. But I think we ought to be very candid. I have worked on this issue since I came to the Congress. I have proposed consolidated acquisition statutes in three separate Congresses. I sense the obstacles are bigger today than ever. The notion of dual conforming statutes, for example, is a cover for the status quo. We who support a uniform procurement code are just plain wasting our time unless the President himself wants a single procurement statute, unless the President says his administration is going to spend the political chips needed, both with his Secretary of Defense and the military services and here in the Congress with the Senate and House Armed Services Committees.

I think it has got to be the President. An Administrator of OFPP or the Deputy Director or Director of OMB is not going to cut it. Mr. Stockman has already told us how easily he gets rolled by Mr. Weinberger. The Defense Department has clearly demonstrated that it resists this effort.

Now the President has proved to us that he can be effective with the Congress. This committee has four members on the Armed Services Committee and four members on Defense Appropriations. With Senator Danforth's leadership, we can work with Armed Services and have a good bill. But without a very visible signal from the man himself, I don't think this effort is going anywhere.

I am sure that's the feeling of the chairman of the House Government Operations Committee as well. We really shouldn't kid ourselves. We shouldn't waste a lot of our time if we aren't going to get that kind of signal and that kind of help.

I hope, Mr. Administrator, that you will express my views downtown. I certainly intend them to be constructive. Having to labor for those three sessions of Congress, I know what it is going to take.

Mr. Chairman, I look forward to working with you in any way you feel is appropriate to try to get the support we need to do this.

Senator DANFORTH. Senator Chiles, thank you very much. You have been the leader in this effort in the Senate, and I look forward to working with you.

Mr. Sowle, welcome.

TESTIMONY OF DONALD E. SOWLE, ADMINISTRATOR FOR FEDERAL PROCUREMENT POLICY, OFFICE OF MANAGEMENT AND BUDGET, ACCOMPANIED BY PATRICIA A. SZERVO, ASSOCIATE ADMINISTRATOR FOR PROCUREMENT LAW AND LEGISLATION; LeROY J. HAUGH, ASSOCIATE ADMINISTRATOR FOR REGULATORY POLICIES AND PRACTICES; AND FRED H. DIETRICH, ASSOCIATE ADMINISTRATOR FOR SYSTEMS AND TECHNOLOGY

Mr. SOWLE. Thank you very much, Mr. Chairman.

I would like to introduce three associate administrators who are with me here today: Ms. Pat Szervo, on my left; Mr. LeRoy Haugh, on my immediate right; and Mr. Fred Dietrich, on my far right.

I would like to say also that I appreciate the opportunity to come here today to discuss our draft proposal for a Uniform Federal Procurement System. I have submitted a statement for the record which I would like to summarize at this time with your permission.

As you know, this proposal is being developed in response to Public Law 96-83 which requires that OFPP propose a uniform procurement system, a central management system for procurement, and any legislation considered necessary to put the new system into effect. The draft proposal which we submitted earlier is a composite of the procurement system, the management system, and the legislative proposal.

I would like to emphasize that this is a draft proposal. It is not a coordinated executive branch position. It was distributed on October 29 for comment by the private sector as well as by executive agencies. Although the public comment period officially ended December 2, we are still receiving comments, and we expect more over the next few weeks. After we have reviewed the comments, we will make revisions in the proposal and coordinate it within the executive branch. It will then be formally submitted to the Congress in compliance with Public Law 96–83.

Federal procurement, as Senator Chiles mentioned, is a $110 billion-a-year business involving nearly one-fifth of the Federal budget, more than 130,000 Federal employees, and over 17 million procurement actions a year. This was for fiscal year 1980.

Federal procurement over the past decade has been studied in depth by a congressionally sponsored commission—again, as Senator Chiles mentioned—and a Presidential blue ribbon defense panel. It has also been the subject of numerous critical General Accounting Office reports and congressional hearings. Problems which have existed for 10 years or more still persist.

The proposed system would put Federal procurement on a more systematic, professional, and businesslike basis than it is today. It has the potential for better control over contract expenditures and, of course, substantial savings.

It is important to recognize that our proposal is not issue-oriented. It does not attempt to deal with individual procurement problems or issues at this point. Rather, the proposal is to establish a system, as required by Public Law 96-83, within which issues can be resolved as they arise.

The principal components of the proposed Federal procurement system are—I have about six or eight of these—a streamlined management structure with clear lines of authority, responsibility, and accountability; decentralized agency procurement operations which are truly responsive, competitive, efficient, and free of cumbersome rules and regulations; a really professional work force; understandable and measurable standards of performance, both for people and for systems; a control system which provides for early recognition and disposition of problems; an organized approach to feedback of information on system performance; and a means to identify and adjust needed changes in legislation, policies, regulations, organizations, personnel, programs, and procedures—all of which make up the system.

The common objective of each of these components is satisfying agency mission needs. It is this common objective which integrates the components into a uniform system.

The proposed system will simplify the procurement process and the regulation by using commercial practices for buying commercial products, shortening and standardizing Government solicitations and contracts, freeing small purchase procedures from numerous current Government requirements, describing needs in terms of function where practical in lieu of predetermined solutions, and providing more flexibility in funding to enable more efficient procurement planning and to avoid hurried yearend spending. It will also facilitate earlier business decisions by involving the procurement official earlier in the process where sound business views are often missing. It will expand competition by providing for new concepts of competition, together with new methods to stimulate and expand the use of competition.

Under the proposed statute, formal advertising procedures would be used, but other procurement methods would be equally acceptable without the necessity of following the current determination and finding requirement for exceptions to formal advertising, as exists today.

A concerted effort will be made to professionalize the procurement work force. Despite the importance of procurement in the judicious expenditure of Federal funds, it has not been an attractive career field in Government. Decisions are regulated in such detail that there is little room for judgment and initiative. A Federal procurement career management program would be established to develop a body of professionals with the skills, knowledge, and attributes needed for the procurement positions.

Two organizational elements are key to managing the proposed Federal procurement system. They are a strengthened Office of Federal Procurement Policy and assignment of agency procurement executives. The Office of Federal Procurement Policy would be the overall system manager and would provide direction, leadership, and continuity in the Government procurement process. The agency procurement executives would be responsible for the overall condition of agency procurement systems and would certify them as meeting prescribed standards. The executives would also help OFPP shape Government-wide policy and set system standards for operations and performance measurement. Other important duties would include establishing unique agency policies and regulations and setting up control and feedback components to monitor agency procurement performance and procurement career programs.

A great deal of work has been done over the past dozen years to lay the foundation for some long-overdue, fundamental reforms in Federal procurement. Our draft proposal is not revolutionary in nature, but it does propose a tighter management arrangement for many of the system elements already in place and improved procurement techniques in the system itself.

I hope we can accommodate whatever problems the public, the agencies, Government contractors, and the Congress may have with our draft proposal so that we can get on with the job. Barring unforeseen difficulties in resolving major issues within the administration, this proposal should reach the Congress by the end of February.

That concludes my summary statement. I would be very pleased to answer any questions.

Senator Chiles [presiding]. Thank you very much for your statement. Without objection, your prepared statement will be made a part of the record of this hearing.

Senator Danforth has gone to vote and will return in just a few minutes.

Can you give me any kind of feel right now of what you anticipate in the way of problems or cooperation on the part of other agencies in regard to the proposal?

Mr. SOWLE. Well, of course, the comments from the agencies are just coming in. We don't have some of the major agency comments yet. I would say that earlier, in some of the informal discussions, many of the agencies felt that our proposal had a lot of merit. In every case one agency or another felt that there was some change that they would like to see made in it. I don't think that is unexpected. In fact, that's the reason we have a draft out for comment.

We do have a system in the administration, as you well know, and I am sure that whenever we have difficulties we will sit down and talk about them and try to work them out and try to come to an understanding so that we can eventually come up here with a proposal that does represent the administration position.

Senator CHILES. How do you see us resolving the Defense Department issue?

Mr. SOWLE. Well, I am not sure what all the issues are at this point. I think it would go through this process. In fact, we had some discussions earlier with the Defense Department, and we were able to come to at least an agreement to come forward with the draft proposal. I am not in a position at this point to really say what eventually will come forward.

Senator CHILES. Do you have any kind of feeling as to whether the administration sees this as a real potential for cost savings?

Mr. SOWLE. My feeling is that the people across the street from where we are think that there is some potential here, and I sense a great deal of interest in what we are doing. I believe we will have the support. Hopefully, we can get the kind of support that you are suggesting, from the top.

Senator CHILES. Do you think that I am being unreasonable in estimating that there is between $5 billion and $11 billion in savings to be made?

Mr. SOWLE. I think that is probably a fair estimate. There is a fairly wide range. I would think at least $5 billion. And I have been asked before, "How do you come up with at least $5 billion?" I guess it is just a consensus of people who have been in the system a long time who feel that if we could clean the system up, much in the way that we are proposing, 5 percent improvement should be attainable—and even more perhaps.

Senator CHILES. When we are looking at the dollars—places we can find to cut—$5 billion is not a small sum today. Of course, that's a figure that would have a multiple that would grow tremendously. As our procurement increases and continues, that would be a continuing and growing figure.

Senator LEVIN [presiding]. I have reviewed this draft proposal. As you say in your statement, you are not getting into all the specifics that you ultimately will. I appreciate that. However, in some areas, I want to let you know what some of the specifics are that we are working on in Congress so that you can take them into consideration.

The first one that I want to inform you about is S. 1901. This has to do with sole-source, noncompetitive contracts. In the Defense Department alone—I think you are aware of the fact—over 60 percent of the contracts are not competed. They are sole-source contracts. We had a big battle in the authorizing committee just about a month ago, and we lost by one vote an effort to require that there be a longer period of time to advertise noncompetitive contracts and that they be more fully described to give potential competitors or protesters to a noncompetitive contract a greater chance to file either their objection or an alternative proposal. We lost that by one vote, but we got a commitment in the House of Representatives that they would immediately hear the proposal. It's S. 1901, which I have introduced with a good group—a bipartisan group of sponsors, including members of this committee: Senators Cohen, Pryor, and Roth and also Senators Exon and Dixon. So I would bring that to your attention, when you get down to the details.

I notice on page 27 of your document here, relative to a different issue—which is the question of debarment of contractors who have been suspended by other agencies of the Government—that you intend to give the GSA the obligation of consolidating a list so that we are finally acting to stop one agency of Government from dealing with a contractor that has been debarred or suspended by another agency of the Government, unless there is a compelling reason to do so.

That's long overdue. We have a bill in on that, which I think you are aware of also. In this case you did get into some specifics. You said that all operational procurement activities will be required to review this list, that is, that consolidated GSA list, prior to entering into any contractual arrangement. You did get into specifics, but I was disappointed that you didn't take the next step, which isn't much more specific, which is to say that in the absence of some compelling circumstance—which the agency would note for the record—that the agency is obligated not to enter into a contract with that debarred or suspended contractor. I think you know how we feel about that because we have been through that at some length with you.

Mr. **Sowle**. I think we can take care of that in the final proposal.

Senator **Levin**. The third area in which we have indicated a specific interest has to do with the bid protest procedure, to make it viable. Right now, a protest can be filed with the GAO. A bid protest can be filed by a competitor, saying that the awarded contract was wrongfully granted without competition or for some other reason shouldn't have been awarded. That bid protest is really a farce because right while the GAO is reviewing it the contracting officer can go ahead and award the contract. It is very easy to get around, and we are trying to put some teeth into that. I know you are looking into that as well.

Those are the three specific areas that we've gotten into personally, and I just would hope that you'd be aware of the specific legislation that is pending, as I think you are in at least most of those cases. I did want particularly to point out, however, S. 1901, which we just filed the other day, with those cosponsors.

I don't have any questions of you. You may want to respond, and I am going to have to run in about 1 minute if I am going to make this vote. So you can either have a seventh inning stretch or respond or whatever.

Mr. SOWLE. Well, I think, Senator, on each of the three points you raised, as you mentioned, we are aware of those. In fact, we've been working with you and your staff in that area. And I am sure that we can work together to get a satisfactory solution to those.

Our proposal, incidentally, does put emphasis on solving all kinds of problems at the contracting officer level. I think, if we do eventually improve the professionalism of our work force, we'll have far fewer problems floating up for resolution at higher levels. This is a very important point in our proposal.

Senator LEVIN. Has the DOD responded on the question of longer advertising to stimulate competition, on that 30-day amendment of ours? If so, what has been their response?

Ms. SZERVO. No. I believe that has just gone out for comment within the past day or two. I know that it has just come into OMB, but we have not had any responses yet.

Senator LEVIN. While we are on the floor, I want you to know that we are reviewing the record to see the conditions of that lunch that I told you I'd buy. [Laughter.]

There is some dispute among my staff as to whether we said that, if you got the regulations out for comment by a certain date or if you got them in place by a certain date, I may or may not owe you a lunch. We are carefully checking the record here.

Mr. SOWLE. I think Pat won that one.

Senator LEVIN. That's my recollection. My staff is trying to save me some money though. They said, "No, the regulations had to be final and in place." You may settle for breakfast. I'm not sure.

I hate to leave this subcommittee without anyone in charge here, but I am going to have to do it if I am going to make this vote. So if you could accommodate Senator Danforth by hanging in there for a few minutes, we'd appreciate it.

The subcommittee will now stand in recess.

[Recess taken for 10 minutes at 2:45 p.m.]

Senator DANFORTH. Mr. Sowle, let me apologize to you and your associates for this disjointed way of operating. We're going to have, apparently, numerous votes today on the floor. What I'd like to do is to ask you some of the points that are foremost in my mind, at least right now, and then perhaps there will be questions submitted for the record or just discussions as the weeks go on to clear up some of the other points.[1]

First of all, let me ask you this. This proposal, in its present form, is a draft. It is not the final version. Is that correct?

Mr. SOWLE. Yes, sir. That is correct.

Senator DANFORTH. The final version will be presented when, would you say?

Mr. SOWLE. We expect to have that to the Congress by the end of February.

Senator DANFORTH. And between now and the end of February, you will be working with the Department of Defense and GSA to develop a final proposal?

Mr. SOWLE. All of the agencies who have comments. We will be meeting with them, trying to resolve any differences, trying to incorporate thoughts that they have that are compatible with the total system into a final proposal, and trying to get that final proposal coordinated in the executive branch.

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[1] See p. 31.

Senator DANFORTH. I wonder if it would be possible during this period of time for us to be working, maybe informally—we don't want to be living at your desk or needlessly bothering you—if we could perhaps maintain kind of an informal contact during that period of time and work with you to see if the final product that's fashioned is one that has the maximum possibility of getting through the Congress.

Mr. SOWLE. We'd very much like to do that, Senator.

Senator DANFORTH. One of the things that strikes me as a problem—I am just talking about getting something done without drawing needless opposition—is your proposal to reform the so-called socioeconomic requirements. Could you explain, just in a nutshell, in the draft as it now exists, what that's all about?

Mr. SOWLE. Yes, sir. What we have in mind there—and, of course, this would require congressional action—we have in mind relieving all purchases up to $25,000 of some of the statutory requirements that make it difficult and time consuming for the contracting community to award contracts. It clutters up the whole system.

When you think in terms of over 17 million actions under $10,000, out of a total of a little less than 17.5 million, raising this to $25,000 isn't going to increase the number that much more. Most of the procurement actions, over 95 percent of them, will be under $25,000. If we could clean up that end of the spectrum, it would make it much simpler for small businesses, for industry in general, for the contracts people, everyone involved, to have a better system.

Senator DANFORTH. Let me just raise a couple of caution flags on that. One caution flag would be that when we get into this area, for many of the proposed reforms—such as the proposal affecting Davis-Bacon, there would be considerable opposition. So I would caution you as you work out the final package—unless you want to get whole blocs just dead set against it, just making up their minds immediately that this reform is bad, saying "Don't bother me with any more details; I'm against it"—because of this particular point, I would caution you to proceed very slowly in this area. I remind you, for example, on Davis-Bacon, that the Senate recently defeated a similar effort to waive application of Davis-Bacon for military construction. I would guess that you would have a loser on your hands in that regard. I haven't studied all of the socioeconomic requirements—you say 45 different provisions would be waived for small contracts?

Mr. SOWLE. There are about 45 or 46 I think we have identified in our proposal, which apply to procurement generally. Not all of these apply to small purchases.

Senator DANFORTH. I haven't reviewed each one of those, but I would guess that a number of them would have keenly attentive groups that might be turned off for the whole program.

Mr. SOWLE. One thing has come up several times before that I think is worth mentioning and that is that we are not really talking about changing the small business set-aside program, the 8(a) program, or any of the labor surplus programs at all. Those would still exist as they do today. They could still apply under $25,000, if they chose to do that.

Senator **Danforth**. As I say, I haven't studied it in any depth at all. This is one thing that I think we would like to talk to you about further in the weeks ahead.

Mr. **Sowle**. All right, sir.

Senator **Danforth**. Another caution that I would just flag on is this: As I understand it, the ceiling would be per transaction, is that right?

Mr. **Sowle**. Per transaction, yes, sir, $25,000.

Senator **Danforth**. So that you could have a very large operation which sells many, many things to the Government, but sells them in relatively small batches, and it would be exempted?

Mr. **Sowle**. Yes. Again, when we think in terms of the $25,000, most of the actions today in fiscal year 1980, according to our Federal procurement data system—over 17 million of them—were under $10,000. Raising this to $25,000 really doesn't change the number of actions that much, those that are considered in a special category.

Senator **Danforth**. Do you think that problem already exists?

Mr. **Sowle**. Essentially, that's right. Of course, again, that's where most of the paperwork is. We've got to somehow clean up all of the paperwork that goes with these little transactions.

Senator **Danforth**. As I understand it, there is a possible alternative in your proposal for dual conforming statutes instead of a single statute. Might that be a mistake? That is, if you have dual conforming statutes, one for the Pentagon and one for the rest of Government, you could have, and almost certainly would have, as an example, two bodies of case law growing up in the event of litigation. It would seem to me, just at first blush—I don't prejudge anything—but it would seem to me that that would be a dubious way to proceed.

Mr. **Sowle**. Well, of course, there are many different viewpoints on that. That's why we have left it in our draft proposal as optional to go one way or the other.

Senator **Danforth**. Just for whatever it is worth, if this is going to be one of the issues that will be resolved in the next few months, my own immediate reaction—you are giving us a draft proposal and we are giving you kind of a first-blush reaction—and I do think that that's helpful. I think this is the way we should be operating. But I would tell you how I feel about it. Offhand, it seems to me that it would probably be a mistake to do it.

Could you describe to me the interrelationship, the allocation of responsibility, between the DOD, the GSA, and OFPP under the proposal?

Mr. **Sowle**. Well, this relationship, I think, hones in primarily on the regulatory area. That's one we've heeded most in our proposal. At the present time, the Office of Federal Procurement Policy does not have regulatory authority. This was taken away 2 years ago when the Office was extended.

Under our proposal, OFPP would have regulatory authority, DOD would have regulatory authority, and GSA would have regulatory authority. And the way we would envision that operating is that DOD and GSA would really develop the Government-wide regulation; and as long as they were in agreement on what could be in there, Government-wide, with the participation of the procurement executives from the other departments, then OFPP basically would not become involved.

But as it exists today, there are differences of opinion on what ought to be included in the Government-wide regulation, how it should be stated, what the format should be, and this sort of thing. And we feel that if you are going to have Government-wide regulations someone has to be in a position of making decisions on what that regulation is going to be.

And so we would work on an exception basis really, to assure that the Government-wide regulation was truly applicable and meaningful to all of the departments.

I think in honesty and fairness, if you follow the concept we have, if all of the procurement executives participated in a council as to what went into the Government-wide regulation, that eventually the Federal Procurement Regulation, which applies across the civil agencies, would evaporate—it would go away.

The Government-wide regulation, then, would be put out by all of the agencies working together. And GSA would then be much the same as any other agency. Their unique policies and regulations would be put out by them.

Senator DANFORTH. Let me see if I understand this. You would have either one statute encompassing all procurement or, in the alternative, one statute for the Defense Department and another statute for everybody else. We've talked about that previously, my concerns about that. Under either set of circumstances, however, there would be one set of regulations?

Mr. SOWLE. One Government-wide regulation. Now, we are very specific in our proposal that there are unique regulations and unique policies. Policies, of course, are established at various levels. For example, policies that the Congress imposes on the executive branch would be the ones that we would be primarily concerned with, those that apply across the Federal Government. The policies and regulations that are unique to a given department would be the responsibility of that department so long as they did conform to the overall statutory policies that we would be responsible for.

Senator DANFORTH. Therefore, regulation which would be specific to a particular agency might be promulgated by that agency provided that it did not circumvent the general regulatory program for all the agencies. And that determination as to whether it conformed or did not conform to the general regulatory scheme would be made by whom?

Mr. SOWLE. By OFPP. A final decision. Of course, all of the agencies, again with procurement executives, would be looking at this total regulation from the inception.

Senator DANFORTH. All right. So OFPP would be able to, in essence, veto specific agency regulations that would not conform to the general scheme.

Now then, with respect to the agency, the Government-wide regulations, it is my understanding that whether there is one statute or two there would be one general set of regulations which would apply to both the Defense Department and the rest of Government.

Mr. SOWLE. Yes, sir, that's correct.

Senator **Danforth**. Even if there were two statutes, there would be one set of regulations?

Mr. **Sowle**. That's the one thing that I think would be very important—if we had two statutes, to be sure without question that we do have one Government-wide regulation.

Senator **Danforth**. Incidentally, if there were two statutes and a lawsuit were brought under one, and the effect of that lawsuit would be to affect the regulations under that statute, wouldn't you end up, in fact, with differences over a period of time?

Mr. **Sowle**. I'm afraid I can't answer that; maybe Pat can.

Senator **Danforth**. I don't know. I mean, it is just something to think about.

Mr. **Sowle**. That's a very good question. I really don't know. I haven't thought that through.

Senator **Danforth**. Now, in developing this one set of regulations, how would they be developed, the overall regulations?

Mr. **Sowle**. First of all, we have identified procurement executives who would be in every department. Procurement executives would become part of a council that would have overall guidance over the regulations and would also give counsel and support and guidance to OFPP in the development of their policies.

And then we envision that the actual operation of this regulation would be carried on by a staff made up of people from the agencies, so that you have complete integration of the viewpoints of the agencies into that Government-wide regulation, and it would be carried out mainly by the agencies, except if there were a problem. If there were a problem, of course, we would be a participant, and we'd know of the problems. If there were a problem, we would have the authority then to resolve whatever that issue was.

Senator **Danforth**. Now, let's suppose that regulations were promulgated as to the procedures to be followed for bidding. That would be a type of regulation, correct? It is my understanding that you have a council and that that council works to develop a single all-embracing regulation or set of regulations pertaining to the bidding process. Is that how it works? You wouldn't have one type of regulation for, say, HUD, another type of regulation for HHS, another for Treasury, and so on?

Mr. **Sowle**. No, sir. In that particular example, the Government-wide regulation would apply to every agency of the Federal Government. Now, if there were—and this could be based on the statutory requirement, for example—if there were some special or unique situation with a given agency or a statute that applied just to that agency, then there would have to be an exception in that case. So there is plenty of flexibility.

Senator **Danforth**. You have flexibility for special occasions?

Mr. **Sowle**. Flexibility for special occasions. But, generally, the industrial community, or those contracting with the Federal Government, would pretty much look at the Federal Government as one entity and not a whole bunch of entities.

Senator **Danforth**. But the general overall regulations, in the development of them, how they are put together, there is a council that does that; but if there is disagreement, do they vote? Does majority rule in the council, or is there some final arbiter of disagreements?

Mr. Sowle. The final arbiter would be the Office of Federal Procurement Policy. It could be just one agency, for example, Mr. Chairman, who just absolutely couldn't go along with what the staff wanted to do and they could raise this issue, and OFPP would have to make a decision one way or the other. In the event they didn't like the decision that was made, we would have a mechanism for them to appeal to the Director of OMB.

Senator **Danforth.** That would be an ongoing responsibility of OFPP?

Mr. Sowle. Yes, sir.

Senator **Danforth.** It would be obvious in the initial promulgation of regulations, as they are changed and developed over the years?

Mr. Sowle. Yes, sir, it would be continous.

Senator **Danforth.** So that, say, if the Pentagon were to take the position that they wanted to, they only wanted to make purchases according to some special provision that they insisted on, you would have the option, you would have the power to just overrule that?

Mr. Sowle. Yes, sir.

Senator **Danforth.** And that they could then appeal that to OMB?

Mr. Sowle. That's right.

Senator **Danforth.** Did they agree with that?

Mr. Sowle. We haven't really talked to them about that point. I suspect this will be one of the areas or kinds of things that we will be discussing with them over the next few weeks.

Senator **Danforth.** Yes; my own view is that something like that is the way it should work. That is to say, you have to have some—if you are going to have a Government-wide system of procurement, there has to be a final arbiter of what the regulations are. There should be—there must be—somebody with whom the buck finally resides.

Mr. Sowle. Mr. Dietrich wants to add something to that.

Mr. Dietrich. I didn't want the wrong impression to be left about buying everything in all the agencies the same way, on bidding. For example, if we were buying a similar product in different agencies, the bids, the requests for bids, would be the same, but certainly we wouldn't use the same type of a bid for buying a ship as we use for buying janitorial services.

Senator **Danforth.** No, I understand that.

Mr. Dietrich. I know that some people have the wrong impression of the proposal from that point of view, and I want to make sure it is clear.

Senator **Danforth.** I would understand that buying, say, a missile system or a fighter plane would be a little different than buying pencils.

Now, with respect to the sole-source versus competitive-bid contracts, you would have five cases in which noncompetitive contracts could be awarded. Are you convinced that your limitations on noncompetitive contracts are tightly drawn?

Mr. Sowle. Well, I think we really have to add one additional one to the ones we have in our proposal and that is under the 8(a) program. Those are not necessarily noncompetitive, but right now they are not necessarily competitive either. So that's a sixth criteria. But we think that this listing of five or six actually covers all the situations in which we would have reason to go noncompetitively. And the actual control over that, the general control, would be identified in the procurement regulation with the agencies implementing this as to how specifically they would like to control noncompetitive procurements in the departments. One of the things that we have suggested in our proposal is to have what we call advocates for competition who would have a responsibility of reviewing the data, reviewing procurements, under the authority of the procurement executive, to assure that maximum competition was being obtained and control over the other side of that coin, of course—control of the noncompetitive procurements.

Senator DANFORTH. Finally—unfortunately, we've got another vote on and I am not going to detain you through that—I just have one more question.

With respect to specifications, design specifications, so-called functional specifications, the one leading complaint I get from business people who want to do business with the Federal Government, and have done business with the Federal Government, is that it is just totally unreal—the specifications which don't necessarily have very much to do with the functions for which the product is going to be used. It would mean a redesign, a retooling, for the product, undue expense, and a bidding up of the cost or running up of the cost of complying in order to meet the design specifications.

It is my understanding that your proposal moves away from design specifications toward what are called functional specifications. Are there any problems or pitfalls in that? Could you elaborate on what your theory is?

Mr. SOWLE. Well, I think this is an area where really quite a little emotion gets involved. You used exactly the right term. We would move away from the use of design or detailed specifications. However, we would not eliminate the use of those. We think in many cases detailed specifications are necessary. I think this is true where you have a unique item, such as a military item, and you are buying parts or whatever to support that item. You've got to have detailed specifications to be sure that they all fit together.

However, for many, many products that the Government uses, there are many types of products in the commercial marketplace that will perform the function that the Government needs to have done. And we think that more use of functional specifications will actually give us a better competitive market, actually give us better products, because products have been proven in the marketplace and probably at cheaper cost.

One of the problems—and again, this is part of the, I think, misunderstanding—people sometimes within the Government want a commercial product but then they immediately say: "Oh, I want different terms and conditions for that product. I want to paint it a different color. I want it packaged differently. I want it shipped differently. I want different warranty provisions," or whatever. And they immediately move away from the commercial marketplace when, in many cases, it wouldn't be necessary.

So we do favor moving away from detailed specifications. We think this will be greatly advantageous to the Federal Government.

Senator **Danforth**. Are there pitfalls in this? I am all for it. I hasten to say that. I am for it personally. But could we be getting ourselves into a situation where, because we don't have a mathematical standard any more, people are going to say: "Well, this procurement officer is a friend of such-and-such a supplier and he is playing favorites," that kind of thing?

Mr. **Sowle**. I think with our total system we aren't running much of a risk. I suppose anytime you make a change you are taking some risk that you didn't quite foresee. But I think with the procurement executives and the feedback data we have and the management controls, with the requirements for better people—better qualified people, better trained people—I think the risk is very minimal of getting into a really serious problem area.

Senator **Danforth**. Mr. Sowle, thank you very much, and again, I apologize for the helter-skelter way that we have had to operate because of the votes on the floor. I very much appreciate your being here and your associates being here. I do sincerely look forward to working with you in the weeks and months ahead. I think you are engaged in something that is very much worth doing. It's going to be hard to pull it off, but I think it is very much worth doing, and I want you to know that we are here to support you and to work with you.

Mr. **Sowle**. Thank you very much, Mr. Chairman.

[Mr. Sowle's prepared statement and responses to questions submitted by Senator Danforth follow:]

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL
PROCUREMENT POLICY

HOLD FOR RELEASE UNTIL DELIVERY
EXPECTED AT 10:00 A.M., DECEMBER 10, 1981

STATEMENT OF DONALD E. SOWLE ADMINISTRATOR FOR FEDERAL PROCUREMENT POLICY OFFICE OF MANAGEMENT AND BUDGET BEFORE THE SUBCOMMITTEE ON FEDERAL EXPENDITURES, RESEARCH AND RULES OF THE SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

I APPRECIATE THE OPPORTUNITY TO COME HERE TODAY TO DISCUSS OUR DRAFT PROPOSAL FOR A UNIFORM FEDERAL PROCUREMENT SYSTEM.

BACKGROUND

AS YOU KNOW, THIS PROPOSAL IS BEING DEVELOPED IN RESPONSE TO PUBLIC LAW 96-83, THE OFFICE OF FEDERAL PROCUREMENT ACT AMENDMENTS OF 1979. THE OFFICE OF FEDERAL PROCUREMENT POLICY (OFPP) WAS ORIGINALLY ESTABLISHED BY STATUTE IN 1974 TO PROVIDE OVERALL DIRECTION OF PROCUREMENT POLICIES, REGULATIONS, PROCEDURES AND FORMS FOR EXECUTIVE AGENCIES. THE OBJECTIVE WAS TO IMPROVE ECONOMY, EFFICIENCY, AND EFFECTIVENESS IN THE PROCUREMENT OF PROPERTY AND SERVICES.

WHEN OFPP WAS REAUTHORIZED IN 1979, CONGRESS DIRECTED IT TO PREPARE AND SUBMIT A PROPOSAL FOR A UNIFORM PROCUREMENT SYSTEM, A CENTRAL MANAGEMENT SYSTEM AND ANY LEGISLATION

CONSIDERED NECESSARY TO PUT THE NEW SYSTEM INTO EFFECT. THE DRAFT PROPOSAL WHICH YOU HAVE BEFORE YOU IS A COMPOSITE OF THE PROCUREMENT SYSTEM, THE MANAGEMENT SYSTEM, AND LEGISLATIVE PROPOSAL.

I WANT TO EMPHASIZE THAT THIS IS A DRAFT PROPOSAL. IT WAS DISTRIBUTED ON OCTOBER 29, 1981, FOR COMMENT BY THE PRIVATE SECTOR AS WELL AS BY EXECUTIVE AGENCIES. ALTHOUGH THE PUBLIC COMMENT PERIOD OFFICIALLY ENDED DECEMBER 2ND, WE ARE STILL RECEIVING COMMENTS AND EXPECT MORE OVER THE NEXT FEW WEEKS.

AFTER WE HAVE REVIEWED THE COMMENTS, WE WILL MAKE APPROPRIATE REVISIONS IN THE PROPOSAL AND COORDINATE IT WITHIN THE EXECUTIVE BRANCH. IT WILL THEN BE FORMALLY SUBMITTED TO THE CONGRESS IN COMPLIANCE WITH PUBLIC LAW 96-83.

NEED FOR IMPROVEMENTS IN PROCUREMENT

FEDERAL PROCUREMENT IS A $110-BILLION-A-YEAR BUSINESS INVOLVING ONE-FIFTH OF THE FEDERAL BUDGET, MORE THAN 130,000 FEDERAL EMPLOYEES, AND OVER 17 MILLION PROCUREMENT ACTIONS A YEAR. ANOTHER $30 BILLION ARE SPENT ON PROCUREMENT UNDER ASSISTANCE PROGRAMS.

EXPENDITURES OF THIS MAGNITUDE ARE UNDERSTANDABLY OF GREAT CONCERN TO BOTH CONGRESS AND THE EXECUTIVE AGENCIES. FEDERAL PROCUREMENT OVER THE PAST DECADE HAS BEEN STUDIED IN DEPTH BY A

CONGRESSIONALLY SPONSORED COMMISSION ON GOVERNMENT PROCUREMENT AND A PRESIDENTIAL BLUE RIBBON DEFENSE PANEL AND HAS BEEN THE SUBJECT OF NUMEROUS GENERAL ACCOUNTING OFFICE REPORTS AND CONGRESSIONAL HEARINGS. SOME OF THE PERSISTENT PROBLEMS ARE:

- THE PROCUREMENT PROCESS IS SO COMPLEX THAT IT CANNOT RESPOND EFFECTIVELY TO THE AGENCY PURPOSES IT SERVES. TOO OFTEN, USERS OF PROPERTY AND SERVICES DO NOT GET WHAT THEY NEED WHEN THEY NEED IT.

- LESS THAN HALF THE FEDERAL PROCUREMENT DOLLARS ARE SPENT COMPETITIVELY: COMPETITION IS CURTAILED BY THE COMPLEXITY OF THE PROCESS, FUNDING CONSTRAINTS, RESTRICTIVE SPECIFICATIONS, LITTLE ADVANCE PLANNING, AND LIMITED MARKET KNOWLEDGE.

- THERE IS WASTEFUL, HURRY-UP SPENDING AT THE END OF EVERY FISCAL YEAR.

- QUALITY EXTREMES: ON ONE HAND, SUPPLIERS CUT CORNERS AND MEET THE LOWEST ACCEPTABLE STANDARDS AND, ON THE OTHER HAND, OVERLY EXPENSIVE ITEMS ARE PROCURED TO PROTECT AGAINST INFERIOR QUALITY.

- EXCESSIVE DELAYS, CHANGES, AND COST GROWTH IN THE PROCUREMENT OF NEW SYSTEMS, RESULTING IN SHORTFALLS IN AGENCY CAPABILITIES.

- ADVERSARIAL RELATIONSHIPS BETWEEN GOVERNMENT AND ITS SUPPLIERS BECAUSE OF THE CUMBERSOME, COSTLY, AND FRUSTRATING PROCUREMENT PROCESS. THIS RELATIONSHIP HAS CONTRIBUTED TO THE EROSION OF THE INDUSTRIAL BASE.

- THE STATUTORY BASE IS OUTDATED AND FRAGMENTARY; REGULATIONS ARE VOLUMINOUS AND COMPLEX; MEANINGFUL STANDARDS OF PERFORMANCE ARE LACKING; FLOW OF AUTHORITY AND RESPONSIBILITY IS NOT CLEAR; AND THERE IS ALMOST NO ACCOUNTABILITY FOR RESULTS.

CONGRESS DECIDED TWO YEARS AGO, AND THE PRESIDENT CONCURRED, THAT ENOUGH STUDIES HAD BEEN MADE. THEY DIRECTED THAT A FEDERAL PROCUREMENT SYSTEM BE DEVELOPED, TOGETHER WITH NEEDED STATUTORY CHANGES. THE PROPOSED SYSTEM WOULD PUT FEDERAL PROCUREMENT ON A MORE SYSTEMATIC, PROFESSIONAL, AND BUSINESS LIKE BASIS THAN IT IS TODAY. IT HAS THE POTENTIAL FOR BETTER CONTROL OVER CONTRACT EXPENDITURES AND SUBSTANTIAL SAVINGS.

PRINCIPAL COMPONENTS OF THE PROPOSED SYSTEM

IT IS IMPORTANT TO RECOGNIZE THAT OUR PROPOSAL IS NOT ISSUE-ORIENTED. IT DOES NOT ATTEMPT TO DEAL WITH INDIVIDUAL PROCUREMENT PROBLEMS OR ISSUES. RATHER, THE PROPOSAL IS TO ESTABLISH A SYSTEM, WITHIN WHICH ISSUES CAN BE RESOLVED AS THEY ARISE.

THE PRINCIPAL COMPONENTS OF THE PROPOSED FEDERAL PROCUREMENT SYSTEM ARE:

- A STREAMLINED MANAGEMENT STRUCTURE WITH CLEAR LINES OF AUTHORITY, RESPONSIBILITY, AND ACCOUNTABILITY.
- DECENTRALIZED AGENCY PROCUREMENT OPERATIONS TRULY RESPONSIVE, COMPETITIVE, EFFICIENT, AND FREED OF CUMBERSOME RULES AND REGULATIONS.
- A PROFESSIONAL WORK FORCE.
- UNDERSTANDABLE AND MEASURABLE STANDARDS OF PERFORMANCE.
- A CONTROL SYSTEM THAT PROVIDES FOR EARLY RECOGNITION AND DISPOSITION OF PROBLEMS.
- AN ORGANIZED APPROACH TO FEEDBACK OF INFORMATION ON SYSTEM PERFORMANCE.
- A MEANS TO ADJUST THE LEGISLATIVE, POLICY, REGULATORY, ORGANIZATIONAL, PERSONNEL, AND PROCEDURAL ASPECTS OF THE SYSTEM.

THE COMMON OBJECTIVE OF EACH OF THESE COMPONENTS IS SATISFYING AGENCY MISSION NEEDS. IT IS THIS COMMON OBJECTIVE WHICH INTEGRATES THE COMPONENTS INTO A UNIFORM SYSTEM.

THE SYSTEM FULLY RECOGNIZES THE ECONOMIES THAT CAN BE DERIVED FROM EFFECTIVE COMPETITION. IN ADDITION, THE SYSTEM CALLS FOR A MODERN STATUTORY FOUNDATION WHICH WILL PROVIDE THE BASIS FOR TIMELY POLICY DIRECTION, DEVELOPMENT OF SYSTEM STANDARDS, AND A SIMPLE, WORKABLE REGULATION. THIS SINGLE GOVERNMENT-WIDE REGULATION WILL ALLOW MAXIMUM LATITUDE FOR JUDGMENT BY A PROFESSIONAL AND ACCOUNTABLE WORK FORCE.

WHAT THE PROPOSED SYSTEM WILL DO

A. SIMPLIFY THE PROCUREMENT PROCESS AND THE REGULATION

A SINGLE, SIMPLIFIED GOVERNMENT-WIDE REGULATION WOULD BE ISSUED. MANY OF TODAY'S REGULATIONS THAT MAKE FEDERAL PROCUREMENT RIGID AND IRRITATE USERS AND THE PRIVATE SECTOR WOULD BE ELIMINATED.

MANY PRESENT DAY IMPEDIMENTS TO THE PROCUREMENT PROCESS WOULD BE REMOVED, FOR EXAMPLE, BY:

- USING COMMERCIAL PRACTICES FOR BUYING COMMERCIAL PRODUCTS.
- SHORTENING AND STANDARDIZING GOVERNMENT SOLICITATIONS AND CONTRACTS.
- FREEING SMALL PURCHASE PROCEDURES FROM NUMEROUS CURRENT GOVERNMENT REQUIREMENTS.
- DESCRIBING NEEDS IN TERMS OF FUNCTION IN LIEU OF PREDETERMINED SOLUTIONS.
- PROVIDING MORE FLEXIBILITY IN FUNDING TO ENABLE MORE EFFICIENT PROCUREMENT PLANNING AND AVOID HURRIED YEAR-END SPENDING.

B. FACILITATE EARLIER BUSINESS DECISIONS

THE PROCUREMENT OFFICIAL WOULD BE INVOLVED AT THE "FRONT END" OF THE PROCESS WHERE SOUND BUSINESS VIEWS ARE OFTEN MISSING. THE PURPOSE IS TO ENABLE THIS OFFICIAL TO COORDINATE WITH PROGRAM MANAGERS, ASSESS THE MARKETPLACE FOR PROSPECTIVE SOURCES OF NEEDED PROPERTY AND SERVICES, AND THEN DEVISE A PROCUREMENT STRATEGY THAT BEST FULFILLS THE NEED. THE NEW SYSTEM CALLS FOR AGENCIES TO PLAN PROCUREMENTS SUFFICIENTLY AHEAD TO ALLOW TIME, NOT OFTEN AVAILABLE TODAY, TO SEARCH THE MARKETPLACE AND ATTRACT COMPETITION.

C. EXPAND COMPETITION

THE SYSTEM PROVIDES FOR NEW CONCEPTS OF COMPETITION, TOGETHER WITH NEW METHODS TO STIMULATE AND EXPAND THE USE OF COMPETITION. THE SYSTEM WOULD ALSO ESTABLISH ADVOCATES TO HELP PLAN FOR COMPETITION EARLY IN THE PROCURING CYCLE. IT LIMITS NONCOMPETITIVE PROCUREMENTS TO VERY SPECIAL CIRCUMSTANCES.

VIGOROUS COMPETITION AMONG SUPPLIERS HAS LONG BEEN A PROCUREMENT GOAL, BUT MANY PRODUCERS BECOME SO FRUSTRATED WITH THE MAZE OF REGULATIONS, ERRATIC FUNDING AND PLANNING, GOVERNMENT INTERFERENCE, PROFIT LIMITATIONS, AND LATE PAYMENTS THAT THEY EITHER LIMIT THEIR BUSINESS WITH THE GOVERNMENT OR LEAVE THE GOVERNMENT MARKET TO THOSE WHO ARE WILLING TO ACCEPT THESE FRUSTRATIONS. THE DEPARTING FIRMS ARE SOMETIMES THE MORE COMPETENT ONES. THE SHRINKING BASE OF SUPPLIERS, BOTH AT PRIME AND SUBCONTRACTOR LEVELS, IS A VERY REAL CONCERN.

THE FORMAL ADVERTISING REQUIREMENT IN PRESENT LAW IS INTENDED TO KEEP THE SYSTEM HONEST AND TO ASSURE "FULL AND FREE COMPETITION." THE PROCESS, HOWEVER, IS NOT WORKING. DETAILED DESIGN SPECIFICATIONS ARE INHERENT IN THIS METHOD OF PROCUREMENT WHERE PRICE ALONE IS THE CONSIDERATION FOR CONTRACT AWARD. THIS DEPRIVES THE GOVERNMENT OF PRIVATE

SECTOR INGENUITY AND A RANGE OF COMMERCIALLY AVAILABLE PRODUCTS AND SERVICES. IN ORDER TO GAIN MARKETPLACE ACCEPTANCE, COMMERCIAL PRODUCTS AND SERVICES MUST BE DESIGNED TO COMPETE BOTH ON PRICE AND PERFORMANCE, INCLUDING OPERATING COSTS, EASE OF MAINTENANCE, AND DURABILITY (LOWEST TOTAL COST).

D. PROFESSIONALIZE THE PROCUREMENT WORK FORCE

DESPITE THE IMPORTANCE OF PROCUREMENT IN THE JUDICIOUS EXPENDITURE OF FEDERAL FUNDS, IT HAS NOT BEEN AN ATTRACTIVE CAREER FIELD IN GOVERNMENT. DECISIONS ARE REGULATED IN SUCH DETAIL THAT THERE IS LITTLE ROOM FOR JUDGMENT AND INITIATIVE. A FEDERAL PROCUREMENT CAREER MANAGEMENT PROGRAM WOULD BE ESTABLISHED TO DEVELOP A BODY OF PROFESSIONALS WITH THE SKILLS, KNOWLEDGE, AND ATTRIBUTES NEEDED FOR PROCUREMENT POSITIONS. AS THE GOVERNMENT'S BUSINESS MANAGERS FOR CONTRACT MATTERS, PROCUREMENT PERSONNEL WILL HAVE AUTHORITY TO EXERCISE JUDGMENT AND WILL BE HELD ACCOUNTABLE FOR THEIR ACTIONS.

HOW WILL THE SYSTEM BE MANAGED?

TWO ORGANIZATIONAL ELEMENTS ARE KEY TO MANAGING THE PROPOSED FEDERAL PROCUREMENT SYSTEM. THEY ARE A STRENGTHENED OFFICE OF FEDERAL PROCUREMENT POLICY AND AGENCY PROCUREMENT EXECUTIVES.

ROLE OF THE OFFICE OF FEDERAL PROCUREMENT POLICY

THE OFFICE OF FEDERAL PROCUREMENT POLICY (OFPP) WOULD BE THE OVERALL SYSTEM MANAGER AND WOULD PROVIDE DIRECTION, LEADERSHIP, AND CONTINUITY IN THE GOVERNMENT PROCUREMENT PROCESS. ITS PRINCIPAL FUNCTIONS WOULD BE:

- ESTABLISHING AND MAINTAINING THE FEDERAL PROCUREMENT SYSTEM AND ITS STANDARDS.
- PROVIDING GOVERNMENT-WIDE PROCUREMENT POLICY DIRECTION.
- OVERSEEING DEVELOPMENT OF A SIMPLIFIED GOVERNMENT-WIDE REGULATION.
- ENSURING AGENCY CONFORMANCE TO POLICIES AND STANDARDS.
- PROVIDING LEADERSHIP AND ENHANCING PROFESSIONALISM IN THE WORK FORCE.
- MANAGING A PROCUREMENT DATA SYSTEM THAT PROVIDES TIMELY INFORMATION ON AGENCY PERFORMANCE.

- COORDINATING RESEARCH PROJECTS TO IMPROVE FEDERAL PROCUREMENT.

REGULATORY AUTHORITY WOULD BE VESTED IN DOD, GSA, AND OFPP. OFPP'S AUTHORITY WOULD BE EXERCISED WHEN AGREEMENT CANNOT BE REACHED ON THE CONTENT OF THE SINGLE SIMPLIFIED GOVERNMENT-WIDE PROCUREMENT REGULATION. APPEALS FROM OFPP DECISIONS, MADE AS A RESULT OF EXERCISE OF THIS AUTHORITY, WOULD BE RESOLVED BY THE DIRECTOR OF OMB.

THE LINK BETWEEN CENTRALIZED POLICY ESTABLISHED BY OFPP AND AGENCY PROCUREMENT ORGANIZATIONS WOULD BE GOVERNMENT-WIDE PROCUREMENT STANDARDS, WITH SUFFICIENT FLEXIBILITY TO ALLOW AGENCIES TO TAILOR THE SYSTEM TO MEET THEIR OPERATIONAL NEEDS. THESE STANDARDS WOULD BE EXPRESSED IN MEASURABLE TERMS OR AS OBJECTIVES. SUCH STANDARDS WOULD BE DEVELOPED AND KEPT UP TO DATE BY OFPP WORKING WITH AGENCY PROCUREMENT EXECUTIVES AND THE PRIVATE SECTOR.

ROLE OF THE AGENCY PROCUREMENT EXECUTIVE

ON BEHALF OF THE AGENCY HEADS, PROCUREMENT EXECUTIVES WOULD BE RESPONSIBLE FOR THE OVERALL CONDITION OF AGENCY PROCUREMENT SYSTEMS AND WOULD CERTIFY THEM AS MEETING

PRESCRIBED STANDARDS. THE EXECUTIVES WOULD ALSO HELP OFPP SHAPE GOVERNMENT-WIDE POLICY AND SET SYSTEM STANDARDS FOR OPERATIONS AND PERFORMANCE MEASUREMENT. OTHER IMPORTANT DUTIES WOULD INCLUDE SETTING UP CONTROL AND FEEDBACK COMPONENTS TO MONITOR PROCUREMENT PERFORMANCE AND PROCUREMENT CAREER PROGRAMS.

A NEW STATUTORY FOUNDATION

THERE ARE NOW TWO BASIC STATUTES THAT PRIMARILY GOVERN FEDERAL PROCUREMENT, ONE FOR DEFENSE AND THE OTHER FOR CIVIL AGENCIES. WITH THESE SEPARATE NONCONFORMING STATUTES, DIVERGENT REGULATIONS AND PRACTICES WERE INEVITABLE. IN ADDITION, THERE HAVE BEEN NUMEROUS OTHER DIVERGENT LEGISLATIVE PROVISIONS ENACTED OVER THE YEARS FOR INDIVIDUAL AGENCIES. SUPPLIERS COMPLAIN THAT THESE DIVERGENCES MULTIPLY THEIR ADMINISTRATIVE COSTS AND ADD TO THEIR FRUSTRATIONS IN DEALING WITH THE GOVERNMENT.

A NEW MODERN SIMPLIFIED STATUTORY BASE, EITHER A SINGLE STATUTE OR TWO CONSISTENT STATUTES, WOULD REPLACE THE EXISTING OBSOLESCENT AND FRAGMENTED STATUTORY BASE AND SERVE AS THE FOUNDATION FOR AN INTEGRATED SYSTEM AND ONE FACE TO INDUSTRY.

COSTS AND BENEFITS OF THE SYSTEM

THE COSTS OF IMPLEMENTING THE NEW FEDERAL PROCUREMENT SYSTEM ARE EXPECTED TO BE MINIMAL IN RELATION TO THE POTENTIAL BENEFITS.

THE ESTIMATED TANGIBLE BENEFITS FROM OPERATION OF THE NEW SYSTEM ARE STILL UNDER DEVELOPMENT. INTANGIBLE BENEFITS, WHICH ARE CONSIDERED OF ALMOST EQUAL VALUE TO THE TANGIBLE BENEFITS, INCLUDE INCREASED PUBLIC CONFIDENCE IN THE FEDERAL GOVERNMENT AND A GOVERNMENT BUSINESS RELATIONSHIP THAT WOULD IMPROVE PRODUCTIVITY ON BOTH SIDES.

PROBLEMS YET TO BE RESOLVED

WE HAVE NOT COMPLETED REVIEW OF THE COMMENTS RECEIVED SO WE DON'T KNOW WHAT ISSUES MAY BE RAISED. UNDOUBTEDLY THERE WILL BE MANY THAT WE WILL HAVE TO WORK OUT WITH THE AGENCIES. HOWEVER, I AM CONFIDENT FROM EARLY INFORMAL REPORTS THAT THE GENERAL THRUST OF OUR DRAFT PROPOSAL IS ACCEPTABLE TO MOST OF THE AGENCIES.

A GREAT DEAL OF WORK HAS BEEN DONE OVER THE PAST DOZEN YEARS TO LAY THE FOUNDATION FOR SOME LONG OVERDUE, FUNDAMENTAL REFORMS IN FEDERAL PROCUREMENT. I HOPE WE CAN ACCOMMODATE

WHATEVER PROBLEMS THE PUBLIC, THE AGENCIES, GOVERNMENT CONTRACTORS AND THE CONGRESS MAY HAVE WITH OUR DRAFT PROPOSAL SO WE CAN GET ON WITH THE JOB. BARRING UNFORESEEN DIFFICULTIES IN RESOLVING MAJOR ISSUES WITHIN THE ADMINISTRATION, THIS PROPOSAL SHOULD REACH THE CONGRESS BY THE END OF FEBRUARY.

THAT CONCLUDES MY PREPARED REMARKS. I WILL BE HAPPY TO ANSWER ANY QUESTIONS.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL
PROCUREMENT POLICY

JAN 25 1982

Honorable John C. Danforth
Chairman, Subcommittee on Federal Expenditures,
Research, and Rules
Committee on Governmental Affairs
128 C Street, N.E., Room 44
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

Enclosed are the answers to the questions for the record which you forwarded with the transcript of the Subcommittee's December 10, 1981 hearing on OFPP's Draft Proposal for a Uniformed Federal Procurement System.

I look forward to working with you and the Subcommittee staff as we development the final proposal.

Sincerely,

Donald E. Sowle

Donald E. Sowle
Administrator

Enclosure

SUBCOMMITTEE ON FEDERAL EXPENDITURES, RESEARCH AND RULES
COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE
HEARING
ON
THE OFFICE OF PROCUREMENT POLICY'S
DRAFT PROPOSAL
FOR A
UNIFORM FEDERAL PROCUREMENT SYSTEM
DECEMBER 10, 1981

ADDITIONAL QUESTIONS FOR THE RECORD

1. Some commentators have suggested that over the years, since the issuance of the Commission on Government Procurement's report, there has been substantial improvement in the federal procurement system. Some might say that most of the major problems have been dealt with and that only legislative or regulatory "fine tuning" is needed. How do you respond to this argument?

A. There have been many improvements, but it is obvious that there are still many major problems. Numerous congressional hearings and the General Accounting Office reports still point up problems in procurement. DOD, which accounts for over 75% of total Government procurement, states that improving its acquisition process is one of its most pressing problems. Over half of the COGP recommendations have yet to be implemented. The procurement system proposal resolves many of these, and will deal with the remaining ones. The proposal also addresses two other prevalent problems -- securing adequate competition and simplifying the procurement process.

2. Commentators at your December 1st public hearing stated that the OFPP's legislative proposal has the effect of changing Public Law 95-582, the Brooks Act. Is it the intention of the Administration to amend the Brooks Act? Does the legislative proposal amend or change the Act by indirection?

A. No. We are not proposing any change in the Brooks Act. We do think that some form of competition for A-E services is feasible, without making price the determining factor, but we do not have any plans at this time to recommend changes.

3. The OFPP proposal would eliminate many socioeconomic requirements from procurements under $25,000 and from all purchases of commercial products. During the hearing, Senator Danforth made very clear his reluctance to alter socioeconomic protections now provided in federal law. Most of the discussion of this effort at "simplification" has focused on small purchases, but it would appear that the draft legislation brings all procurements of commercial products within the exemption. Couldn't this result in some very large contractors avoiding socioeconomic requirements?

A. We need to separate these two issues and treat small purchases first. We are gathering data which will show the number of actions and total dollars in purchases below $25,000 for certain procurement programs such as construction and services. This will enable us to assess the impact of raising the ceiling and dropping socioeconomic programs from small purchases. It is our view that all small businesses would benefit from such a change. Commercial products needs further study. Eventually, we do need to make it easier to do business with the Government, particularly for off-the-shelf products. The challenge is to find the optimum way to promote programs in the national interest, e.g., hiring handicapped, EEO, etc., without stifling innovation, competition, or interest in doing business with Government. We may propose a test period for commercial products by a couple large agencies, using simplified procedures and forms, to give us a better basis for evaluating the impact on socioeconomic programs.

4. Repeatedly during the Subcommittee's hearings on the current state of the procurement system, witnesses from the business community complained of the complexity of the existing system. The OFPP proposal states that there are 64,000 pages of regulations which encumber the procurement process. The proposal calls for a single, government-wide set of regulations -- the Federal Acquisition Regulations (FAR). However the proposal also allows individual executive agencies to issue their own regulations.

a. How are you going to control the growth of the FAR?

A. The FAR will replace the Federal Procurement Regulations and most of the existing Defense Acquisition Regulation. When completed, the FAR will contain all policies, regulations, procedures and forms that are used by more than one agency. It will be maintained by interagency coordination of and agreement on, proposed revisions. The present plan is to have lead agencies responsible for designated parts of the FAR to keep them current and to ensure that the coverage satisfies the needs of all the agencies. We don't envision a problem in controlling growth of the FAR, but rather in avoiding proliferation of agency regulations.

b. Will agency regulations be restricted to unique statutory requirements, binding on that agency's procurements? Will individual agencies be free to pursue their favorite ways of doing business through subregulations? What will keep the agencies in check?

A. Each agency will have its own supplementing regulation which will contain those policies and regulations unique to the agency. The criteria and guidelines for agency supplementing regulations will be contained in the FAR. Periodic reviews of agency implementing regulations will be another means of controlling the agency regulations. Agencies will be encouraged to try new techniques and to improve the procurement process in general, but will not be permitted to subvert the FAR through subregulations.

c. Why aren't these agency regulations made subject to the same notice and public comment provisions as the FAR?

A. Agency regulations will be subject to notice and comment if they significantly affect the public. Purely internal operating procedures will not require notice and comment.

5. The OFPP proposal repeatedly makes mention of "centralized policy direction and leadership" and "decentralized operations." Please provide some examples of what these terms mean in practical terms.

A. These terms are used to emphasize that OFPP will not become involved in agency procurement operations. It's role would be one of procurement system leadership and ensuring coordination of Government-wide policy, standards, and regulatory matters. Each agency would be responsible, as it is now, for managing and directing its procurement program. OMB Circular A-109 on the acquisition of major systems is a central policy; the actual buying of a major system is a decentralized operation.

6. During the Subcommittee's recent hearings on the current state of the federal procurement system, it became clear that an adversarial relationship exists between government and many of its contractors.

(a) Give some specific examples of how the OFPP proposal will help to alleviate these tensions.

A. The FPS will help alleviate adversarial relationship by simplifying the procurement process, relieving small purchases of many socioeconomic requirements, placing greater reliance on marketplace solutions, etc.

Some commentators have suggested that the proposal creates opportunities for additional tensions. For example, the provision for government access to a contractor's plant and records as a result of the most insignificant contract modification. The proposal's omission of any protections against technology transfer during source selection has also been noted.

(b) Are these legitimate concerns?

A. They are certainly valid points — and we will be looking closely at these in preparing our final proposal. We want to make sure that the coverage is clear and that adequate rationale is provided.

7. Procurement planning seems to be a keystone of the new procurement system that OFPP is proposing. In particular, it is urged as a way to control year-end spending which, in many cases, leads to contracts let with little or no competition to meet questionable public requirements. The legislative proposal does not squarely address this persistent problem. Would OFPP support legislation to stop wasteful year-end spending?

A. We believe the legislative changes included in our draft proposal, when viewed collectively, deal with the problems of year-end spending that are within the control of the executive branch. The proposal provides for proper advanced planning and market research, introduces new ideas and concepts for competition and severely limits noncompetitive procurements. All of these will help to cut down year-end spending. Additionally, the management controls and standards discussed in Chapter 2 of the proposal and contained in the model statute will help to ensure both responsibility and accountability in the conduct of the procurement process, particularly as it relates to this issue.

We do not believe separate legislation is needed on this issue; it should be treated within the context of overall changes to the procurement system. There may be very legitimate reasons for heavy spending in the last quarter of a fiscal year, e.g., the normal administrative lead time for most complex, high dollar contracts, especially when competitive proposals must be evaluated. Hurry-up wasteful year-end spending can be largely controlled by the system changes noted above. We will, however, review the proposed legislation to see if this matter can be more fully addressed.

8. Your draft statutory proposal recognized five situations in which a non-competitive contract might be awarded. We understand that you plan to add coverage for Section 8(a) set-sides and for purchases of blind-made and prison-made products. There is some concern as to whether the proposed statutory limitations are tight enough. For example, a non-competitive procurement would be permitted:

> when the urgency for the requirement will not permit delay inherent in competitive bidding, such as in the case of public exigency; ...
>
> or
>
> when awards will be made to a contractor who has proposed an unsolicited, unique idea or innovation to the Government.

(a) What is the standard circumscribing "public exigency"?

A. The term "public exigency" would require careful implementation in regulations in order to avoid abuses. As now implemented in the Defense Acquisition Regulation and the Federal Procurement Regulations, public exigency covers situations of unusual and compelling urgency, such as fire, flood, explosion, and other situations when the Government would be seriously harmed if normal procurement procedures were followed.

(b) Is there a chance that the unsolicited proposal exception makes it even easier for an agency program manager to contract with a vendor of preference, despite the objections of the agency's "advocate for competition"?

A. The unsolicited proposal exception has always been a difficult one, because of the problem of determining not only what is truly "unsolicited", but also what is truly "unique" or "innovative." This too, will require judicious implementation and application. We do plan to clarify our proposal to ensure that unsolicited proposals are not used as a means of avoiding competition.

9. Many commentators have voiced concern over how and when functional specifications will be used. Their application to most items of military hardware, spare parts, and especially construction has been strongly challenged. Would you elaborate on how and when functional and design specifications would be used under OFPP's proposal?

A. There is no intent to mandate functional specifications across the board. We recognize that there are many items, particularly replacement parts for complex systems, that must be manufactured according to detailed specifications. Detailed specifications are also needed for construction. However, there are also many items which are available in the market, but for which the Government maintains detailed specifications -- even for such common items as office furniture. This limits competition to those who are willing to manufacture to a special design, and prevents the Government from taking advantage of a range of products that the normal competitive marketplace might offer. Our objective would be to use functional specifications wherever considerations of standardization, interchangeability, etc. did not dictate the use of detailed specifications.

10. The OFPP proposal advocates a "new concept of competition." In the "new standards for competition" section, the proposal suggests that:

> Bids will be solicited from a sufficient number of prospective sources to ensure effective competition. All potential sources need not be solicited for every procurement. Rotation of source lists may be used when list(s) of potential sources are unreasonably long...

On their face, these words have caused some to suggest that competition will be restricted under the "new concept." Is this a valid concern?

A. This may be a valid concern if the new concept is not properly understood and implemented. However, the rotation of bidders' list in those cases where lists are very long, in order to achieve efficient competition, is only one small facet of the new concept. If properly managed, rotation of bidders lists on individual procurements should not restrict competition in an overall sense, particularly since agencies will be required to synopsize proposed procurements in the Commerce Business Daily.

11. The OFPP proposal urges replacing the currently available source selection techniques of "formal advertising" and "competitive negotiation" with two new techniques, "bidding without discussions" and "bidding with discussions."

Given the appropriate use of functional or performance specifications and the general availability of contract award criteria, other than simple low price (i.e., "lowest total cost" or "multiple factors"), what is the operational difference between the current competitive source selection techniques and those proposed?

A. These three types of competition (price, lowest total cost and multiple factors) build on successful practices of the past. The main operational difference in the source selection technique is increased latitude for business judgments. These judgments would be necessary, for example, on the different values offered in products and services and their total cost implications. (Such costs would not be ignored even if they cannot be precisely quantified.) There will also be the latitude to reject buy-in pricing that comes back later in the form of bailouts or increased product costs. Auctioning will be forbidden, as will technology transfer without adequate consideration. There will be increased emphasis on use of multidiscipline teams in source selection evaluations as opposed to simple price decisions. The owners of patented and proprietary items will be included in competitive source selections if there are alternatives.

(Note: There was no Q. No. 12)

13. During the Subcommittee's hearings on the current state of the federal procurement system, witness after witness from the private sector urged simplification of the procurement process. In particular, they urged using commercial purchasing techniques to purchase off-the-shelf commercial items. The draft proposal follows these suggestions in large measure.

(a) Does the procurement work force now have the skills to do the job if the new system is put into place? Does today's contracting officer have the ability and skill to conduct a procurement by "bidding without discussions" using a performance specification designed to obtain a range of commercially available items and to make a fair award using "lowest total cost" or "multiple factors"?

A. Many of the concepts presented in the proposal in the area of competition, such as the use of functional specifications or a greater reliance on commercial products, are not totally new. We believe that many contracting officers have the needed skills to apply these proposed concepts and with minimal training and indoctrination will be able to successfully adapt these skills to the legislative changes being proposed. There must, however, be a more concerted effort to train those personnel who are contributors to the process to ensure the contracting officer receives the proper assistance and documentation to satisfy the Government's need. There are many personnel outside the procurement career field who participate or make contributions to the procurement process such as the specification writer or the requirements officer advising the contracting officer on the technical aspects of the product or service being procured.

(b) Will the new system be ahead of the procurement work force that is essential to making it work efficiently?

A. We believe the timetable for implementation of the system will permit adequate training of the present work force before the system is fully operational. Of course, a general upgrading of the work force through higher qualification requirements, recruitment programs, training, and career management will take longer and will be a continuing program.

14. Various commentators have noted that the draft legislation fails to make mention of the Federal Acquisition Institute (FAI).

(a) If improvement in the procurement work force is essential to the new federal procurement system being proposed, isn't FAI's role even more important?

A. FAI will indeed have an even more important role in improvement of the work force under the proposed system than it has today.

(b) What role do you envision for the FAI under the new proposal?

A. FAI will continue to be the focal point, working with the agencies, to provide leadership for career management of the work force. This includes promoting educational programs in the field of procurement; establishing criteria and standards for agency career programs; advising and assisting the agencies with recruitment, training, performance appraisal and other components of their career programs; and coordinating a program of procurement research to improve the procurement system.

(c) What other plans do you have to improve the skills of the procurement work force?

A. The Procurement Executive in each agency will be primarily responsible for upgrading the agency's procurement work force. Our draft proposal discusses specific areas in which work force improvements are needed, and also discusses the requirement to develop personnel qualification and performance standards. The final proposal will include samples of these standards.

Senator **Danforth**. The subcommittee is adjourned.

[Whereupon, at 3:25 p.m., the subcommittee was adjourned subject to reconvene at the call of the Chair.]

CONSIDERATION OF THE PROPOSAL FOR A UNIFORM FEDERAL PROCUREMENT SYSTEM

WEDNESDAY, MAY 5, 1982

U.S. Senate,
Subcommittee on Federal Expenditures,
Research, and Rules,
Committee on Governmental Affairs,
Washington, D.C.

The subcommittee met, pursuant to notice, at 2:15 p.m., in room 3302, Dirksen Senate Office Building, Hon. John C. Danforth (chairman of the subcommittee) presiding.

Staff present: B. Reid Detchon, staff director; William B. Montalto, procurement policy counsel; Ronald A. Chiodo, minority staff director; Robert E. Coakley, minority professional staff member; and Patricia A. Otto, chief clerk.

Also present: Karah Henry, staff director, Subcommittee on Congressional Operations and Oversight; Susan Collins, staff director, Jeffrey A. Minsky, chief investigator, and Linda Gustitus, minority staff director and chief counsel, Subcommittee on Oversight of Government Management.

OPENING STATEMENT OF SENATOR DANFORTH

Senator Danforth. The hearing will come to order.

This afternoon we begin a series of hearings on the Federal procurement system, a subject that has been before this subcommittee repeatedly. Last year the Government spent $134 billion on procurement, a larger amount than the entire budget of all but two Federal agencies—the Departments of Defense and Health and Human Services. Between $5 billion and $10 billion could be saved through reform of this system, and it is our job—our duty—to get that done. The purpose of these hearings is to examine the proposals of the administration and of Members of the Senate to accomplish the reforms that are so badly needed.

During hearings last May, the subcommittee heard witness after witness set forth the problems of the Federal procurement system—its excessive complexity and rigidity and its failure to use the private sector effectively. These problems affect all who would do business with the Federal Government, but they fall hardest on small businesses, and many abandon the Federal marketplace as a result.

For 2 years now, the Office of Federal Procurement Policy has been working on solutions, as required by Public Law 96-83.

On February 26, the administration submitted to the Congress its Proposal for a Uniform Federal Procurement System—a plan to create, perhaps for the first time, an integrated management system for Federal procurement. This system is intended to provide administrative solutions to specific snags in the procurement process. Where there are clearly identifiable problem areas, however, we will be considering whether legislative solutions would be preferable.

On March 17, the President took a first step toward implementing the administration's reform proposal, with Executive Order 12352. As Senator Chiles and I have noted repeatedly, White House support is critical to effective procurement reform, and this Executive order is a signficant statement of support from the President. Continued support will be needed both from the White House and from the Office of Management and Budget if implementation of the proposal is to go forward.

Finally, on April 30, the administration submitted to the Congress its legislative proposals for the new procurement system. Today, and during future hearings, the subcommittee will be receiving testimony on whether these legislative proposals provide the basis for solving the problems with the procurement system or whether more comprehensive changes may be required. On first reading, it appears the administration could have been bolder.

Our leadoff witness today is Senator Cohen, author of S. 2127, the Competition in Contracting Act of 1982. Senator Cohen's bill addresses one of the most persistent and costly problems with the Federal procurement system today—the excessive and unwarranted use of noncompetitive, sole-source contracts. We will be comparing the solutions offered in S. 2127 to those in the administration's proposals.

We will also hear today from Donald E. Sowle, Administrator of the Office of Federal Procurement Policy, about the administration's proposals, and from his three predecessors about the proper role of that office in the management of the Government's procurement activities.

Finally, we will begin today to receive testimony from the people who have to deal with this system in the private sector.

We are currently engaged in a great debate about the Federal budget: In our effort to reduce the deficit, should we cut spending or increase taxes? Many people argue passionately that one answer is right and the other wrong. But I think everyone would agree that, where possible, the Government should improve its efficiency and do more with less. And that's what these hearings are all about.

Senator Cohen, thank you for being with us.

TESTIMONY OF HON. WILLIAM S. COHEN, U.S. SENATOR FROM THE STATE OF MAINE

Senator COHEN. Thank you very much, Mr. Chairman. I want to commend you for scheduling these hearings and appreciate having the opportunity to talk about the bill that we have introduced.

I also want to commend you for attracting such a large audience here in this room this afternoon. It is almost double the amount we had this morning in this very same room for a hearing dealing with the sale and transfer of technology, and actually theft of technology, to the Soviet Union. So, you can see there is perhaps a wider interest in the procurement area.

In February, I introduced the Competition in Contracting Act of 1982, which would provide new procedures to expand the use of competition in Government contracting and impose greater restrictions on the awarding of noncompetitive contracts. I am pleased to have Senators Roth, Levin, Mitchell, and Proxmire as cosponsors of this legislation.

As you pointed out in your opening statement, Mr. Chairman, the Federal Government spends almost one-fifth of its total annual budget on the direct purchase of goods and services from the private sector. In fiscal year 1981, these contracts totaled over $134 billion.

Under the Armed Services Procurement Act and the Federal Property and Administrative Services Act, formal advertising is the preferred method of procurement, with negotiation authorized by prescribed exceptions. Despite this emphasis on competition through formal advertising, negotiated contracts account for the vast majority of Government procurement dollars. Negotiated contracts can, in fact, be competitive—and our legislation recognizes and encourages competitive negotiation when it is the appropriate contracting method. Unfortunately, more than half of all negotiated contracts are now sole sourced. These sole-source contracts are the ones that concern us.

According to figures compiled by the Office of Federal Procurement Policy, out of a total of $134.6 billion awarded by Government agencies in fiscal year 1981, $50.8 billion was awarded competitively, $72.2 billion was negotiated without competition, and $11.6 billion used other methods. Although OFPP has not estimated the potential cost savings that would have been achieved had the Government used competitive instead of noncompetitive procedures, several studies have indicated that as much as 25 percent could be saved through increased competition.

Outside of potential cost savings, competition in the procurement process generally provides for better quality. In some cases, competition might cost more, as in the dual-sourcing proposal advocated by Dr. Jacques Gansler, but the result is a better product and a stronger industrial base. The bottom line is that competition among suppliers is necessary to maintain integrity in the expenditure of public funds by insuring that the good or service to be acquired is of the best quality at a low, if not the lowest, cost.

In our legislation, we have taken a new approach to Government contracting by distinguishing between competitive and noncompetitive procedures in lieu of formal advertising and negotiation. In this manner, competitive nogotiation is put on a par with formal advertising, or competitive procedures, and exceptions are provided to justify noncompetitive procedures, such as sole-source contracting.

Recognizing that the exception, that is, negotiation, has become the rule, our legislation would do two major things. (1) It would increase the use of competition in contracting by permitting agencies to use the competitive method most conducive to the conditions of the contract, and (2) it would impose greater restrictions on the awarding of noncompetitive contracts by shifting the emphasis from having to justify negotiation to having to justify noncompetitive procurements.

The formal advertising requirement in present law is intended to keep the system honest and to assure "full and free competition." This emphasis on formal advertising, however, results in excessive justification requirements for the use of negotiated procurements. If contracting officers need to consider factors other than price in making awards, or wish to have any discussions with prospective contractors, they have to satisfy one of the statutory exceptions. For all practical purposes, competitive negotiation lacks recognition as a bona fide competitive technique.

In our legislation, agencies would be permitted to use either competitive method—bidding with discussion, which is competitive negotiation, or bidding without discussion, formal advertising—whichever is the most conducive to the conditions of the contract. Generally, the nature of the product or the service to be acquired and the marketplace circumstances are going to dictate the most effective method.

By placing competitive negotiation on par with formal advertising, we are recognizing that competition takes more than one form. Also, by eliminating the constraints put on negotiated contracts and all the attendant paperwork, we have lifted a great administrative burden from the shoulders of the executive agencies.

Now, to control the use of negotiation under the present statutes, Congress has required that its use be justified under 1 of the 17 exceptions for the Department of Defense, NASA, and the Coast Guard, or 15 exceptions for the civilian agencies. Each exception, in turn, has subexceptions which provide many opportunities for the contracting officer to negotiate, competitively or noncompetitively, rather than to formally advertise. Our concern is that negotiated awards made without competition represent a much larger portion of the total procurement dollar.

Although competition might not be available for some Government contracts, the GAO has found that many sole-source contracts could be competed. According to an April 1982 report which examined six civil agencies' sole-source contract awards totaling $538.1 million, competition was feasible on an estimated 40 percent of the awards. Similarly, a July 1981 GAO report found that the Defense Department failed to obtain available competition in awarding $289 million in fiscal year 1979 contracts sampled by the GAO.

During the hearings that we held on "hurry-up spending" in the 96th Congress before the Senate Governmental Affairs Subcommittee on Oversight of Government Management, we also found an overreliance on sole-source contracting. The subcommittee determined that sole-source procurements were easily justified under the "competition is impracticable" exception. Out of the 17, this is perhaps the easiest to invoke and the one most frequently invoked. This exception is broad, as I have indicated, and particularly easy to utilize. We found, in fact, that an agency's need to award a contract by the end of the fiscal year often became the motivation behind unnecessarily restrictive specifications that consequently made competition "impracticable."

The subcommittee concluded that sole-source contracts are often used to mask what are, at best, procrastinated policy decisions or, at worst, collusive arrangements between high-level managers and contractors.

GAO's two main recommendations for improving competition in Government contracting, as set forth in that April 1982 report, are incorporated in this bill.

First, the GAO has recommended that criteria must be met to justify sole-source procurement. Our legislation would reduce the proportion of noncompetitive contracts by shifting the emphasis from having to justify negotiated contracts, as is the practice in the present statutes, to having to justify noncompetitive contracts. These new restrictions would help insure that Government agencies award sole-source contracts only when they are truly justified.

GAO's second recommendation would require a market search—which includes a preaward notice in the Commerce Business Daily—for competitive sources before approving a sole-source justification, unless specified conditions are met. Now, in a situation in which it may be specified that only one source is available, we'd have a check against that exception being invoked. That is, when the single-source justification is offered, S. 2127 would require the agencies to make one last attempt to obtain competition through a procurement notice. They would have to publish a notice in the Commerce Business Daily. In the event that a contracting officer knows of only one source for a particular good or service, the procurement notice, in our judgment, would serve to flush out the marketplace for other potential competitors. And the legislation also provides for necessary exceptions to the procurement notice requirement.

In light of this new evidence, Mr. Chairman, I am particularly pleased that you have scheduled these hearings to review legislative proposals, including S. 2127, to improve our procurement practice.

I might say that this particular bill, or any bill that you might consider, is not going to be a panacea to our procurement practices. It is very, very complex. As you know, the procurement process involves billions of dollars. Any changes made to the procurement statutes are not going to result in any radical improvement. Improved procurement practices will not be immediate. Since we procure items and services which last over a long period of time, they might not become visible for years to come. As a matter of fact, Dr. Gansler, who I have had testify before my own subcommittee, is asking that we have dual-sourcing in the Defense Department for a number of different types of weapon systems. The benefits of this proposal to the taxpayer will not be realized for many years to come.

So, with that caveat in mind, this particular bill is designed to at least stimulate some discussion of ways in which we can try to curb sole-source contracting. S. 2127 would tighten up the exceptions to competition by reducing them from 17 exceptions to 6 major exceptions. Hopefully, through simplification and oversight, we can make some marginal improvement.

I want to caution, again, that even under the best of circumstances we are not going to see any major radical changes if this bill is adopted, but there should be some improvement.

Senator DANFORTH. Thank you, Senator Cohen.

Have you looked at the administration's proposal and the legislation they are proposing to implement it?

Senator COHEN. I have, yes.

Senator DANFORTH. How does this competition section differ from your bill?

Senator COHEN. Well, there is one major loophole in the OFPP proposal and that is the "competition is impractical" exception. That's the major exception in the present statutes that provides such a wide loophole for sole-source contracting.

I might point out, the "competition is impractical" exception was not in the final OFPP draft of the administration's proposal. In my own estimation and judgment, this exception was probably added as a result of some considerable involvement, participation, and pressure by the Defense Department. But that is the major difference between S. 2127 and the competition section of the administration's proposal.

We include an exception from competitive procedures, allowing for sole-source procurement when the property or services needed by the Government are available only from a single source. When this exception is invoked, however, executive agencies would have to go one step further; that is, to advertise for a period of 30 days to make sure there is only one competitor.

Senator DANFORTH. You have cited the two GAO reports as proof that sole-source contracts could have been competed. Do you have any other evidence of that?

Senator COHEN. Well, there have been a number of hearings on sole-source contracting held by the Joint Economic Committee, the Labor and Human Resources Committee, and the House Committee on Government Operations.

As I said in my statement, we held extensive hearings on "hurry-up spending" a year ago. We also have held hearings before the Governmental Affairs Committee to investigate the procurement practices of the Defense Department. Throughout those hearings, we came back to the same essential problem: an overreliance upon sole-source contracts.

I have two reports to provide the subcommittee.[1] The first is a DOE report which found that yearend spending, or "hurry-up spending," led to a rushed atmosphere in which the contracts were inadequately reviewed and insufficiently competed. Of those DOE procurements in which competition was, in fact, possible or feasible, only 59 percent were awarded competitively in fiscal year 1980 and that is to be compared with a decline from 82 percent in fiscal year 1979. I also have a USDA report which found that the same sort of yearend pressures curtailed competitive contracts.

Now, one of the problems you have—and I'm sure some of the witnesses who come after me will testify to this fact—is that it's hard to change procurement practices and policies as long as we have an incoherent, inconsistent legislative appropriation process. There is merit to that particular charge. Many times we do not appropriate until well into the session, until the early fall, and sometimes we don't appropriate at all, but go by way of continuing resolution. So, there is some legitimacy to those complaints, which is one reason why there is an exception that allows negotiation in the case of public emergency because Congress has not acted. But I would suggest to the chairman that perhaps the most often cited reason for the delay or the resort to sole-source contracts is because the agency has not adopted a sound procurement plan. I think this is widely known.

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[1] See pp. 58 and 61 for synopses of the two reports. Copies of the reports in their entirety will be retained in the subcommittee's files.

To give you an example, we found in our "hurry-up spending" hearings that the EPA had in fact adopted a fairly rational, sound, comprehensive program in order to plan for their programs for the coming year. And yet, that particular plan was unknown to OMB. It was virtually unknown to any of the other agencies within the executive branch, as such. Here we had a case where one agency was doing something about its procurement practices in order to plan throughout the year prospectively, and yet it had virtually no circulation.

I might say that under this administration there has been greater attention paid to adopting sound plans and policies, but we still have a way to go.

Senator DANFORTH. Your view is that there are a number of contracts that could be handled on a competitive basis that are sole-source instead. What do you think the reason is for that?

Senator COHEN. Well, as I was suggesting, poor procurement planning and failing to follow contracting procedures seem to be the major reasons right now. Some of it might be due to collusion between contractors and Government employees, but I would suggest that is probably minor compared to poor planning. And often it is just sheer procrastination—waiting until the last minute.

Many times we find that these contracts are not let until the final days of the final quarter of the fiscal year. There is suddenly a rush to spend all the money because agencies are afraid that the Congress will cut back their budgets for the following year by the amount that is not spent. And that happens on a fairly frequent basis. Millions of dollars are spent. And we hear the horror stories. Frankly, Mr. Chairman, you can pick up a magazine—it might be Reader's Digest—and read about the abuses within the Federal bureaucracy. Millions of dollars are squandered by purchasing television sets and oriental rugs, or buying 300 pairs of chaps for some youth camp in which they may have only 50 campers, or buying furniture which remains in storage because they have no place to put it. These are all very horrible, very graphic examples of the waste within this giant bureaucracy. They total millions of dollars.

I would submit to you that that is really minor in comparison with the amount of money that is lost by not having sound procurement practices. According to our estimates, "hurry-up spending" in which agencies award contracts noncompetitively results in nearly $2 billion of waste in the Federal Government through poor contracting procedures.

So, while we tend to focus upon the most visible cases of wasteful spending—the most volatile as far as the public is concerned—that total millions of dollars, we are talking about billions of dollars being wasted through noncompetitive practices.

Senator **Danforth**. Senator Cohen, thank you very much. I would like very much if you could join me this afternoon. I do not know what your plans are.

Senator **Cohen**. My plans are to go over to the Senate floor to take part in the DOD authorization bill, Mr. Chairman, but I thank you for the invitation.

[Senator Cohen's prepared statement and synopses of the reports referred to in his testimony follow:]

OPENING STATEMENT OF
SENATOR WILLIAM S. COHEN

Before the

Federal Expenditures, Research, and Rules Subcommittee

Committee on Governmental Affairs

Hearing on

Uniform Federal Procurement System Proposal

May 5, 1982

Mr. Chairman, I want to commend you for scheduling these hearings, and thank you for the opportunity to testify.

In February, I introduced the Competition in Contracting Act of 1982 (S.2127), which would provide new procedures to expand the use of competition in government contracting and impose greater restrictions on the awarding of noncompetitive contracts. I am pleased to have Senators Roth, Levin, Mitchell, and Proxmire as cosponsors of this legislation.

The Federal Government spends almost one-fifth of its total annual budget on the direct purchase of goods and services from the private sector. In fiscal 1981, these contracts totaled over $134 billion.

Under the Armed Services Procurement Act and the Federal Property and Administrative Services Act, formal advertising is the preferred method of procurement, with negotiation authorized by prescribed exceptions. Despite this emphasis on competition through formal advertising, negotiated contracts account for the vast majority of government procurement dollars. Negotiated contracts can be competitive -- and our legislation recognizes and encourages competitive negotiation when it is the appropriate contracting method -- but more than half of all negotiated contracts are now sole-sourced. These sole-sourced contracts are the ones that concern us.

According to figures compiled by the Office of Federal Procurement Policy (OFPP), out of a total of $134.6 billion awarded by government agencies in fiscal year 1981, $50.8 billion was awarded competitively,$72.2 billion was negotiated without competition, and $11.6 billion used other methods. Although OFPP has not estimated the potential cost savings that would have been achieved had the government used competitive instead of noncompetitive procedures, several studies have indicated that as much as 25 per cent can be saved through increased competition.

Outside of potential cost savings, competition in the procurement process generally provides for better quality. In some cases, competition may actually cost more, as in the dual-sourcing proposal advocated by Dr. Jacques Gansler, but the result is a better product and a stronger industrial base. The bottom line is that competition among suppliers is necessary to maintain integrity in the expenditure of public funds by ensuring that the good or service to be acquired is of the best quality at a low, if not the lowest, cost.

In our legislation, we have taken a new approach to government contracting by distinguishing between competitive and noncompetitive procedures in lieu of formal advertising and negotiation. In this manner, competitive negotiation is put on a par with formal advertising -- competitive procedures -- and exceptions are provided to justify noncompetitive procedures.

Recognizing that the exception, that is, negotiation, has become the rule, our legislation will (1) increase the use of competition in contracting by permitting agencies to use the competitive method most conducive to the conditions of the contract, and (2) impose greater restrictions on the awarding of noncompetitive contracts by shifting the emphasis from having to justify negotiation to having to justify noncompetitive procurements.

Expanding Competition

The formal advertising requirement in present law is intended to keep the system honest and to assure "full and free competition." As long as the government is purchasing a common product (such as paper towels), formal advertising works well and is most appropriate. Formal advertising, however, may actually inhibit the government, in some cases, from taking advantage of the marketplace. Detailed design specifications are inherent in this method of procurement where price alone is the consideration for contract award. The result is that the base of suppliers tends to shrink to those few who manufacture to the unique government specifications.

Moreover, this emphasis on formal advertising results in excessive justification requirements for the use of negotiated procurements. If contracting officers need to consider factors other than price in making awards, or wish to have any discussions with prospective contractors, they must satisfy one of the statutory exceptions. For all practical purposes, competitive negotiation lacks recognition as a bona fide competitive technique.

In our legislation, agencies would be permitted to use either competitive method -- bidding with discussion (competitive negotiation) or bidding without discussion (formal advertising) -- whichever is most conducive to the conditions of the contract. Generally, the nature of the product or the service to be acquired and the marketplace circumstances will dictate the most effective method.

By placing competitive negotiation on par with formal advertising, we are recognizing that competition takes more than one form. Also, by eliminating the constraints put on negotiated contracts and all the attendant paperwork, we have lifted a great administrative burden off the shoulders of the Executive agencies.

Restricting Sole-Source Procurement

To control the use of negotiation under the present statutes, Congress has required that its use be justified under one of the 17 exceptions for the Department of Defense, NASA, and the Coast Guard, or 15 exceptions for the civilian agencies. Each exception, in turn, has sub-exceptions which provide many opportunities for the contracting officer to negotiate -- competitively or noncompetitively -- rather than to formally advertise. Our concern is that negotiated awards made without competition represent a much larger portion of the total procurement dollar.

Although competition may not be available for some government contracts, the General Accounting Office has found that many sole-source contracts could be competed. According to an April 1982 report, which examined six civil agencies' sole-source contract awards totaling $538.1 million, competition was feasible on an estimated 40 per cent of the awards. Similarly, a July 1981 GAO report found that the Defense Department failed to obtain available competition in awarding $289 million in the fiscal 1979 contracts sampled by GAO.

During hearings on "Hurry-up Spending" held in the 96th Congress before the Senate Governmental Affairs Subcommittee on Oversight of Government Management, we also found an over-reliance on sole-source contracting. The Subcommittee determined that sole-source procurements were easily justified under the "competition-is-impracticable" exception. This exception is broad and particularly easy to invoke. In fact, we found that an agency's need to award a contract by the end of the fiscal year often became the motivation behind unnecessarily restrictive specifications that consequently made competition "impracticable."

The Subcommittee concluded that sole-source contracts are often used to mask what are, at best, procrastinated policy decisions, or, at worst, collusive arrangements between high-level managers and contractors.

Since the hearings, the Subcommittee has received two new Inspector General reports from the Departments of Agriculture (USDA) and Energy (DOE) on fiscal 1980 "hurry-up" spending.

The USDA report found that time pressures at year-end curtailed competitive contracting in many cases. The Inspector General criticized procurement officials for using the justification of "expiring funds" in order to eliminate or shortcut phases in the procurement process - especially obtaining competition. According to the USDA report, 37 procurements totaling approximately $8 million were awarded at year-end through an abbreviated procurement process.

The DOE report found that year-end spending, coupled with compressed leadtimes for processing, led to a generally rushed atmosphere in which contracts were inadequately reviewed and insufficiently competed. Of those DOE procurements in which competition was feasible, only 59 per cent were awarded competitively in fiscal 1980, a decline from 82 per cent in fiscal 1979.

GAO's recommendations for improving competition in government contracting, as set forth in the April 1982 report, are incorporated into S.2127. First, GAO recommends that criteria must be met to justify sole-source procurement. Our legislation would reduce the proportion of noncompetitive contracts by shifting the emphasis from having to justify negotiated contracts, as is the practice in the present statutes, to having to justify noncompetitive contracts. These new restrictions will help ensure that government agencies award sole-source contracts only when they are truly warranted.

GAO's second recommendation would require a market search -- which includes a pre-award notice in the Commerce Business Daily -- for competitive sources before approving a sole-source justification, unless specified conditions are met. As a further check on unnecessary sole-source contracting, S.2127 would require that agencies, once they have determined that a noncompetitive contract is justified, make one last attempt to obtain competition through a procurement notice. In the event that a contracting officer knows of only one source for a particular good or service, the procurement notice flushes out the marketplace to find other potential competitors. The legislation also provides for the necessary exceptions to the procurement notice requirement.

The third major GAO recommendation would require a written justification for each sole-source award over $10,000 to document the facts and circumstances of the contract. S.2127 requires Executive agencies to establish and maintain an identifiable file or list of all noncompetitive procurements, by fiscal year, which designates the contractor, the articles obtained, the dollar vlaue, the justification for using noncompetitive procedures, and the name of the contracting officer for each procurement.

In light of this new evidence, Mr. Chairman, I am particularly pleased that you have scheduled these hearings to consider legislative proposals, including the Competition in Contracting Act, to improve government contracting procedures. S.2127 sets forth a workable solution to the sole-source problem, and I hope you will support this important legislation.

U.S. Department of Energy

Office of Inspector General

Report on

Year-End Spending by the Headquarters Procurement Office in Fiscal Year 1980

DOE/IG-0173

Release Date: September 23, 1981

SUMMARY

This report discusses the heavy volume of spending that occurred in the Department of Energy (DOE) Headquarters Procurement Office at the end of Fiscal Year 1980. During September 1980, $256 million in procurement obligations were processed, accounting for 22 percent of the annual procurement budget of the office. Further, nearly half of the September awards were made on September 30, the last day of the fiscal year. That single day's activity accounted for $147 million in obligations, or 13 percent of the entire year's total. We found that this high incidence of year-end spending, coupled with compressed leadtimes for processing, led to a generally rushed atmosphere in which contracts were inadequately reviewed and competition for these contracts was restricted.

This review was made in response to a request from the Senate Subcommittee on Oversight of Government Management, Committee on Governmental Affairs, which in 1980 had held hearings on the government-wide problem of "hurry-up" spending. The Subcommittee was particularly concerned by abuses it felt were occurring in the federal procurement process at the end of the fiscal year.

We concluded that the heavy year-end spending and the rushed atmosphere in which it took place, led to inadequately reviewed actions and diminished competition for those awards. We believe that there is a need for more orderly procurement planning during the year to alleviate the year-end rush, and for additional controls over the time provided for reviewing contractual actions before awards are made. Accordingly, we are recommending that the Assistant Secretary for Management and Administration issue a DOE Notice establishing firm procurement leadtimes more evenly spaced for each fiscal year, and that he initiate a DOE Order to provide criteria for better long-range procurement planning in the Department.

MULTI-AGENCY AUDIT
PROCUREMENT - YEAREND SPENDING
WASHINGTON, D.C.
AUDIT REPORT 50550-3-Hy

U.S. Department of Agriculture
Office of Inspector General, Audit
Northeast Region
6505 Belcrest Road, Room 422
Hyattsville, Maryland 20782

DEC 14 1981

I - SUMMARY

Congressional and Presidential interest continues to be a major concern regarding yearend spending patterns of Department and Executive agencies. A recent General Accounting Office (GAO) audit report again criticized agencies for shortcutting the procurement process to quickly expend remaining funds at yearend. In response to the GAO report, the Office of Management and Budget (OMB) directed Government agencies to strengthen controls to assure that yearend purchases are necessary and conducted in accordance with good procurement practices.

Delays in Congressional approval of appropriations and pay supplementals and the resulting process of allocating funds within the agency shorten the amount of time available for requesting and processing procurements. These factors which are beyond the control of agency officials contribute, in part, to the large volume of procurement activity at yearend.

To assess whether USDA agencies were adhering to good procurement practices at yearend, we conducted reviews at 13 procurement offices in six agencies. These offices spent approximately 37 percent of their procurement dollars in the last quarter of Fiscal Year 1980. We reviewed 213 procurement actions totaling approximately $51 million.

Our review of the procurement function in six agencies disclosed a need for a more effective advance procurement planning process. We noted a general lack of coordination among agency program planning, budget, and procurement functions. In addition, there was an absence of, or noncompliance with procurement policies, procedures and controls. As a result, goods and services were procured that did not meet a bona fide current need and procurement processes were shortcut. We found that:

- thirty-two procurements totaling about $3 million lacked evidence of a current bona fide need prior to the availability of funds at yearend. Although program managers were not imprudently expending funds on unneeded items, we did question the propriety of the fiscal year funds used. The majority of these questionable procurements were found in the Food and Nutrition Service, Forest Service, and Science and Education.

- thirty-seven procurements totaling approximately $8 million were awarded at yearend through an abbreviated procurement process. We concluded, and some agencies agreed, that this was done in order to obligate available funds prior to fiscal yearend. One contract represented about $4.5 million of the total amount questioned and because of the significance of the problems noted, was previously reported to the Secretary. More specifically, in the procurements we questioned, we found that the following steps were either cut short or eliminated: (a) preaward planning; (b) development of proper work statements; (c) cost or price analyses and/or audits; and (d) the attainment of maximum competition. We also noted 28 additional cases with various procedural problems which were not attributable to yearend spending rushes. We noted: (a) untimely delivery of end products without liquidated damages assessed; (b) inadequate monitoring of contractor performance and payment; and (c) contract documents not being timely executed.

- three hundred and fifty-five of 1,794 procurement actions (20 percent) totaling over $36 million in five of the six agencies were not reported to the USDA Procurement Reporting System (PRS) in accordance with directives issued by the Office of Federal Procurement Policy. As a result, the effectiveness of the PRS is weakened as a management tool and as a source of information to those using it to monitor and evaluate contracting trends.

We also found that two agencies were not using audits as a pricing aid as required by regulations. In one agency, we noted this problem in relation to all contracts, but, in the other, the deficiency occurred in relation to awards made under section 8(a) of the Small Business Act.

In two agencies, contracts covering multi-year periods were being incrementally funded based on available funds rather than on levels that would provide a usable product should Congress not provide funding in subsequent fiscal years. Currently, there is an absence of guidelines, policies and procedures to govern contracts funded over multi-year periods.

See Exhibit B for listing of questionable cases and deficiencies noted.

Departmental officials agreed that the findings and recommendations in the report were valid. In a written response to the draft audit report, the Office of Operations and Finance responded that a number of actions to improve the procurement functions were underway during Fiscal Year 1981 on nearly every problem identified by audit. The most notable action is the commitment of 5 man-years of scarce resources to the establishment of an Agency Review Team, whose primary responsibility is the review of the procurement functions throughout the Department. Since its inception in March 1981, the team has issued a review guide and has completed reviews of eight agency procurement offices. Ten reviews are scheduled for Fiscal Year 1982. The Procurement Division, O&F, has the complete support of the Assistant Secretary for Administration in its planned initiatives.

Senator DANFORTH. The next witness is Donald Sowle. Mr. Sowle, it is good to see you again, thank you.

Mr. SOWLE. Thank you, sir.

TESTIMONY OF DONALD E. SOWLE, ADMINISTRATOR FOR FEDERAL PROCUREMENT POLICY, OFFICE OF MANAGEMENT AND BUDGET, ACCOMPANIED BY LEROY J. HAUGH, ASSOCIATE ADMINISTRATOR FOR REGULATORY POLICIES AND PRACTICES; AND PATRICIA A. SZERVO, ASSOCIATE ADMINISTRATOR FOR PROCUREMENT LAW AND LEGISLATION

Mr. SOWLE. Mr. Chairman, I appreciate the opportunity to appear here this afternoon to discuss the administration's Proposal for a Uniform Federal Procurement System.

I would like to mention that I have two people with me today, Mrs. Patricia Szervo, who is the associate administrator at OFPP for legislation and law, and Mr. LeRoy Haugh, who is the associate administrator for implementation of what we are now developing. I would like to say that these two people had a major role in putting the proposal together and in the statutory proposals that we have submitted, and I am certainly very pleased to have them here with me today.

The top priority of the Office of Federal Procurement Policy for the past 2 years has been to fulfill the requirement of Public Law 96-83 to develop and submit to the Congress a comprehensive, integrated proposal for a uniform Federal procurement system. We have dedicated the bulk of our resources to this project during that time.

The proposal, which reflects this administration's commitment to procurement reform, was submitted to the Congress on February 26, 1982. It is the result of the first complete examination of Federal procurement since the Commission on Government Procurement published its report 9 years ago. It is also a baseline upon which we can build an improved procurement system for the Federal Government. When implemented, it has the potential for greatly improving procurement practices and significantly reducing procurement costs, perhaps by as much as $9 billion annually.

Our proposal is titled "A Proposal for a Uniform Federal Procurement System." I want to emphasize the word "System" and not "Uniform." It is not a proposal to require that everything from shoes to ships be purchased in the same way, nor is it intended to centrally manage all Government procurement. It does provide for Government-wide procurement policies and regulations, but it also provides for decentralized operations and does not interfere with agency management prerogatives in meeting mission responsibilities.

It is a proposal to put procurement on a more organized, systematic basis than it has been, make some needed improvements, and provide for future changes.

The proposal is based on four fundamental themes. I would like to touch on each of these briefly and then on the legislative proposal.

The first major theme is simplification of the procurement process. This will make it easier for those who contract for the Government, as well as for those who do business with the Government. It will encourage more firms to seek Government business, and it will make procurement more responsive in filling the needs of the user. A variety of measures will contribute to simplification—some examples: There will be greater flexibility in the use of funds. Senator Cohen just referred to the problem of funding and the timely availability of funds. This would provide greater flexibility in the use of those funds and permit them to cross over fiscal years. Needs would be expressed in terms of function or desired performance rather than predetermined solutions. There would be a single Government-wide regulation Unnecessary contract provisions would be eliminated, the small purchase ceiling would be raised, and there would be greater use of imprest funds.

A second major theme of the proposal is enhanced and more effective competition. In the proposal we discussed the shortcomings of the present statutory requirements; that is, either to use formal advertising or justify negotiation under 1 of 17 exceptions in the Armed Services Procurement Act or 1 of 15 in the Federal Property and Administrative Services Act. Formal advertising, by law, is the preferred method of procurement, but it is used today for less than 10 percent of all Federal procurement. The rigid requirements of formal advertising tend to inhibit the Government from taking advantage of the competitive marketplace. It requires detailed specifications and terms and conditions which permit award solely on the basis of price. Most Government requirements cannot be described using this method because detailed specifications do not generally exist and would be too costly to develop. As a result, the number of suppliers tends to shrink, in those instances where detailed specifications are available, to those few—or in some cases only one—who perform to unique Government specifications. The Government often becomes the sole or major customer of these contractors.

We discuss in our February proposal some fundamental changes in the approach to competition. Basically, we propose eliminating the current requirements, either to use formal advertising or justify negotiation, and to make procurement either competitive or noncompetitive. There would be an absolute preference for competition and two equally valid methods of competitive procurement—bidding with discussion and bidding without discussion. Award could be made on the basis of price, lowest total cost, or multiple factors. We have described that in detail in our proposal. Noncompetitive procurement would still have to be justified and would be subject to stricter controls than exist today. However, the negotiation exceptions and the requirement for determinations and findings would be eliminated. Contracting officers would have more flexibility in choosing the type of competition and method of bidding, but they would also be accountable for the results.

A third theme of the proposal is increased "professionalism" of the procurement work force. The proposed system envisions a more responsible role for procurement personnel than they have generally had in the past. This will be particularly important in connection with the new concepts of competition which will require greater initiative and judgment by contracting officers. Furthermore, the wider use of functional and performance-type specifications will require a greater knowledge of the marketplace and closer involvement in developing procurement strategies through better procurement planning.

Insuring an adequate professional work force to meet those responsibilities will require attention to all phases of career management, such as establishing qualification and classification standards, recruiting, training, education, and experience. It will also require an acceptance by other disciplines which play a role in the procurement process, as contracting officers and personnel assume a more responsible role.

The final theme of the proposal is the management system which ties all of the above features into an integrated structure. The management system includes the updated statutory base which outlines specific roles for OFPP and the agencies. The statutes also serve as the basis for the single Government-wide regulation. The key individual in the procurement management structure is the procurement executive, the focal point in each agency for the flow of authority, responsibility, and accountability in the management of procurement. The procurement executive will also be the focal point for coordination with OFPP in developing Government-wide standards for the procurement system, and in developing Government-wide procurement policies.

Specific legislative proposals, which incorporate the substantive statutory reforms contained in the proposal, were submitted to the Congress on April 30, 1982—that's just a few days ago.

We are proposing amendments to the Armed Services Procurement Act of 1947, the Federal Property and Administrative Services Act of 1949, and the Office of Federal Procurement Policy Act. We have not attempted to make the Armed Services Procurement Act and the Federal Property Act identical, but we have tried to make them conform substantively to facilitate the development of uniform Government-wide procurement policies and a single Government-wide regulation.

The Office of Federal Procurement Policy Act, Public Law 93-400, was amended by Public Law 96-83 in 1979 to require that OFPP develop and submit to the Congress a proposal for a uniform procurement system and a central management system, as well as legislative proposals to implement those systems. Since these requirements have now been satisfied, the OFPP Act needs to be updated to clarify OFPP's future role in developing Government-wide procurement policy and in providing leadership in procurement reform through the implementation and maintenance of the Federal procurement system.

One feature that is identical in all three bills is the statement of congressional policies. These policies parallel the significant objectives and features of the proposed system. They include reliance on the private sector to fulfill Government needs and the use of functional descriptions rather than detailed specifications to take full advantage of what the marketplace has to offer and those innovative solutions that creative management and new technology can provide.

Four other changes are worth noting: raising the ceiling for small purchases to $25,000 across the board; incorporating the truth-in-negotiations requirements of Public Law 87-653 into the

Federal Property and Administrative Services Act; adding a section on management responsibilities to both the Armed Services Procurement Act and the Federal Property and Administrative Services Act; and testing new concepts of competition.

Many of the improvements contained in the proposal can be accomplished at least in part without waiting for legislative changes. To initiate administrative actions, President Reagan issued Executive Order 12352 on Federal procurement reforms on March 17, 1982. The Executive order sets forth the principal administrative reforms called for by the UFPS proposal.

With issuance of the Executive order and submission to the Congress of specific legislative reform proposals, we have moved from the developmental phase of the UFPS project to its implementation. The Executive order and the UFPS proposal together, we feel, form a very specific baseline from which we can now move ahead with procurement reform.

I would like to mention finally, Mr. Chairman, as we indicated in our February 26 proposal, that the submission of three bills rather than a single procurement statute should not be interpreted as abandoning the concept or the goal of uniform Government-wide procurement policy. I believe we can achieve necessary substantive procurement reform within the proposed statutory framework—particularly in light of the President's support, as evidenced by the Executive order.

The administration believes that its proposal is a realistic, workable response to the mandate of Congress for meaningful Government-wide procurement reform. The President has taken this action, and we would hope, Mr. Chairman, that the Congress will move promptly on the proposed legislation.

I would be pleased to try to answer any questions you have at this time.

Senator DANFORTH. Thank you, Mr. Sowle.

Have you looked at Senator Cohen's bill?

Mr. SOWLE. I have looked at it. I haven't studied it. But from the comments made by Senator Cohen, I believe that the thrust of his bill is very close to what we have in our Proposal for a Uniform Federal Procurement System. The one difference he pointed out in the area of noncompetitive procurement is an area that we feel should be in our proposal. As long as we have control over that one area, through approval authority vested in the head of an agency with power of redelegation only to an assistant secretary or the equivalent, we feel that we could still have adequate control and would leave the procedures open for cases that we can't really anticipate in advance.

Senator DANFORTH. You mean that you agree with Senator Cohen's bill?

Mr. SOWLE. Generally, we agree with the very thrust of his proposal—his bill. I think there are a few technicalities we'd like to work on with his staff.

Senator DANFORTH. But the main difference he pointed out was the "competition is impracticable" exception. But you agree with him on that?

Mr. SOWLE. Yes, sir. We're right in line with that.

Senator DANFORTH. With Senator Cohen's bill?

Mr. **Sowle**. Yes, sir.

Senator **Danforth**. Let me ask you about the testing provision. I was somewhat surprised to see that the administration was proposing a test. Do we have to have a test?

Mr. **Sowle**. We are not an operating agency. It is the agencies who are spending most of the money that have some reservations about the implementation of our proposal. They won't know for sure what the impact will be until they have started it. And so, I think there is a legitimate reason to have a test. I'm not sure, at this point, how detailed that test would have to be or how lengthy. I envision a test also as a period during which we could develop the procedures and policies that would have to go along with a new concept of competition to be sure that it does work out effectively.

Senator **Danforth**. Let me tell you my concern. As you know, getting the administration's proposal has been a little bit difficult. We've had to keep after them just to get an administration position.

It seems to me that the whole idea of a test is another way of saying, "Let's not rush into anything." Maybe the time has come to get on with it. We've had the staff count up the number of hearings we've had on this issue since I've been the chairman of the subcommittee; this is the 6th day of hearings. We have more scheduled down the road. It is almost as elaborate as what we have in the Finance Committee on a tax bill. We can go on and on with hearings.

My own view is that if reforms are called for and if we are really talking about saving as much as $9 billion I wonder if we could just get on with the program.

Mr. **Sowle**. Senator, I certainly agree that we're interested in procurement reform, and I think we ought to move as rapidly as possible. I think if there are significant areas of risk, we might want to take a good look at those before we move ahead, but we are not opposed to change. We are very much in favor of moving ahead with reform.

Senator **Danforth**. I know you are. [Laughter.]

Mr. **Sowle**. I guess I should say I am speaking for myself on that one. [Laughter.]

Senator **Danforth**. Well, in my view, you are the spokesman for the administration today, Mr. Sowle.

Mr. **Sowle**. Yes, sir. And the President has made it very clear that he would like to have reform and has spelled out a great number of things in the Executive order to accomplish that.

Senator **Danforth**. Right. I understand that there are agencies that view change as threatening. I understand that, but I think one thing that has been the hallmark of the last year and a half is that we have tried to act boldly in accomplishing major reforms.

I would like to do the same with procurement reform, but I don't know whether it is now possible to pass a law in this Congress. We have already been at this for about a year or so. We have more hearings scheduled, and then markups. Before you know it, we will be through with this Congress and into the next one. That signals the start of the process all over again. And then at the end of all that effort you end up with tests? It just seems to me to be a long, involved, unending study process. Time is of the essence. We promised to reform a system. We have just got to get on with it.

You don't disagree with that?

Mr. **Sowle**. I think it is time to move on, yes, sir. As you point out, I think since 1974 there have been bills to reform procurement and they never seem to get anywhere. I do think it is time that we move on. I think we should use whatever caution is necessary to be sure we don't make any big mistakes.

I have full confidence in what we are proposing in the proposal.

Senator **Danforth**. Thank you very much.

Mr. **Sowle**. Thank you, Senator.

[Mr. Sowle's prepared statement follows:]

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL
PROCUREMENT POLICY

NOT TO BE RELEASED UNTIL DELIVERY
EXPECTED AT 2:00 P.M.
WEDNESDAY, May 5, 1982

STATEMENT OF DONALD E. SOWLE
ADMINISTRATOR FOR FEDERAL PROCUREMENT POLICY
OFFICE OF MANAGEMENT AND BUDGET
BEFORE THE
SUBCOMMITTEE ON FEDERAL EXPENDITURES
OF THE
SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS

I APPRECIATE THE OPPORTUNITY TO APPEAR HERE THIS AFTERNOON TO DISCUSS THE ADMINISTRATION'S PROPOSAL FOR A UNIFORM FEDERAL PROCUREMENT SYSTEM.

THE TOP PRIORITY OF THE OFFICE OF FEDERAL PROCUREMENT POLICY FOR THE PAST TWO YEARS HAS BEEN TO FULFILL THE REQUIREMENT OF PUBLIC LAW 96-83 TO DEVELOP AND SUBMIT TO CONGRESS A COMPREHENSIVE, INTEGRATED PROPOSAL FOR A UNIFORM FEDERAL PROCUREMENT SYSTEM. WE HAVE DEDICATED THE BULK OF OUR RESOURCES TO THIS PROJECT.

THE PROPOSAL, WHICH REFLECTS THIS ADMINISTRATION'S COMMITMENT TO PROCUREMENT REFORM, WAS SUBMITTED TO THE CONGRESS ON FEBRUARY 26, 1982. IT IS THE RESULT OF THE FIRST COMPLETE EXAMINATION OF FEDERAL PROCUREMENT SINCE THE COMMISSION ON GOVERNMENT PROCUREMENT PUBLISHED ITS REPORT NINE YEARS AGO

AND IS A BASE LINE UPON WHICH WE CAN BUILD AN IMPROVED PROCUREMENT SYSTEM FOR THE FEDERAL GOVERNMENT. WHEN IMPLEMENTED, IT HAS THE POTENTIAL FOR GREATLY IMPROVING PROCUREMENT PRACTICES AND SIGNIFICANTLY REDUCING PROCUREMENT COSTS -- PERHAPS BY AS MUCH AS $9 BILLION ANNUALLY.

OUR PROPOSAL IS TITLED A PROPOSAL FOR A UNIFORM FEDERAL PROCUREMENT SYSTEM. I WANT TO EMPHASIZE THE WORD SYSTEM, AND NOT UNIFORM. IT IS NOT A PROPOSAL TO REQUIRE THAT EVERYTHING FROM SHOES TO SHIPS BE PURCHASED IN THE SAME WAY, NOR IS IT INTENDED TO CENTRALLY MANAGE ALL GOVERNMENT PROCUREMENT. IT DOES PROVIDE FOR GOVERNMENT-WIDE PROCUREMENT POLICIES AND REGULATIONS, BUT IT ALSO PROVIDES FOR DECENTRALIZED OPERATIONS AND DOES NOT INTERFERE WITH AGENCY MANAGEMENT PREROGATIVES IN MEETING MISSION RESPONSIBILITIES.

IT IS A PROPOSAL TO PUT PROCUREMENT ON A MORE ORGANIZED, SYSTEMATIC BASIS THAN IT HAS BEEN, MAKE SOME NEEDED IMPROVEMENTS, AND PROVIDE FOR FUTURE CHANGES.

THE PROPOSAL IS BASED ON FOUR FUNDAMENTAL THEMES. I WILL TOUCH ON EACH OF THESE BRIEFLY, AND THEN ON THE LEGISLATIVE PROPOSAL.

SIMPLIFICATION AND RESPONSIVENESS

THE FIRST MAJOR THEME IS SIMPLIFICATION OF THE PROCUREMENT PROCESS. THIS WILL (1) MAKE IT EASIER FOR THOSE WHO CONTRACT FOR THE GOVERNMENT AS WELL AS THOSE WHO DO BUSINESS WITH THE GOVERNMENT, (2) ENCOURAGE MORE FIRMS TO SEEK GOVERNMENT BUSINESS, AND (3) MAKE PROCUREMENT MORE RESPONSIVE IN FILLING THE NEEDS OF THE USER. A VARIETY OF MEASURES WILL CONTRIBUTE TO SIMPLIFICATION. FOR EXAMPLE:

- GREATER FLEXIBILITY IN THE USE OF FUNDS.
- EXPRESSING NEEDS IN TERMS OF FUNCTION OR DESIRED PERFORMANCE RATHER THAN PREDETERMINED SOLUTIONS.
- A SINGLE GOVERNMENT-WIDE REGULATION.
- ELIMINATING UNNECESSARY CONTRACT PROVISIONS.
- RAISING THE SMALL PURCHASE CEILING.
- GREATER USE OF IMPREST FUNDS.

INCREASED COMPETITION

A SECOND MAJOR THEME OF THE PROPOSAL IS ENHANCED AND MORE EFFECTIVE COMPETITION. IN THE PROPOSAL WE DISCUSSED THE SHORTCOMINGS OF THE PRESENT STATUTORY REQUIREMENTS -- I.E., EITHER TO USE FORMAL ADVERTISING OR JUSTIFY NEGOTIATION UNDER ONE OF 17 EXCEPTIONS IN THE ARMED SERVICES PROCUREMENT ACT OR ONE OF 15 IN THE FEDERAL PROPERTY ACT. FORMAL ADVERTISING, BY LAW, IS THE PREFERRED METHOD OF PROCUREMENT BUT IT IS USED TODAY FOR LESS THAN TEN PERCENT OF ALL FEDERAL PROCUREMENT. THE RIGID REQUIREMENTS OF FORMAL ADVERTISING TEND TO INHIBIT THE GOVERNMENT FROM TAKING ADVANTAGE OF THE COMPETITIVE MARKETPLACE. IT REQUIRES DETAILED SPECIFICATIONS AND TERMS AND CONDITIONS WHICH PERMIT AWARD SOLELY ON THE BASIS OF PRICE. MOST GOVERNMENT REQUIREMENTS CANNOT BE DESCRIBED USING THIS METHOD SINCE DETAILED SPECIFICATIONS DO NOT GENERALLY EXIST AND WOULD BE TOO COSTLY TO DEVELOP. AS A RESULT, THE NUMBER OF SUPPLIERS TENDS TO SHRINK, IN THOSE INSTANCES WHERE DETAILED SPECIFICATIONS ARE AVAILABLE, TO THOSE FEW (OR IN SOME CASES ONLY ONE) WHO PERFORM TO UNIQUE GOVERNMENT SPECIFICATIONS. THE GOVERNMENT OFTEN BECOMES THE SOLE OR MAJOR CUSTOMER OF THESE CONTRACTORS.

WE DISCUSSED IN OUR FEBRUARY PROPOSAL SOME FUNDAMENTAL CHANGES IN THE APPROACH TO COMPETITION.

BASICALLY, WE PROPOSED ELIMINATING THE CURRENT REQUIREMENTS (EITHER TO USE FORMAL ADVERTISING OR JUSTIFY NEGOTIATION) AND TO MAKE PROCUREMENT EITHER COMPETITIVE OR NONCOMPETITIVE. THERE WOULD BE AN ABSOLUTE PREFERENCE FOR COMPETITION, AND TWO EQUALLY VALID METHODS OF COMPETITIVE PROCUREMENT -- BIDDING WITH DISCUSSION AND BIDDING WITHOUT DISCUSSION. AWARD COULD BE MADE ON THE BASIS OF PRICE, LOWEST TOTAL COST OR MULTIPLE FACTORS. NONCOMPETITIVE PROCUREMENT WOULD STILL HAVE TO BE JUSTIFIED, AND WOULD BE SUBJECT TO STRICTER CONTROLS. HOWEVER, THE NEGOTIATION EXCEPTIONS AND THE REQUIREMENT FOR DETERMINATIONS AND FINDINGS WOULD BE ELIMINATED. CONTRACTING OFFICERS WOULD HAVE MORE FLEXIBILITY IN CHOOSING THE TYPE OF COMPETITION AND METHOD OF BIDDING, AND WOULD BE ACCOUNTABLE FOR THE RESULTS.

INCREASED PROFESSIONALISM

A THIRD THEME OF THE PROPOSAL IS INCREASED PROFESSIONALISM OF THE PROCUREMENT WORK FORCE. THE PROPOSED SYSTEM ENVISIONS A MORE RESPONSIBLE ROLE FOR PROCUREMENT PERSONNEL THAN THEY HAVE GENERALLY HAD IN THE PAST. THIS WILL BE PARTICULARLY IMPORTANT IN CONNECTION WITH THE NEW CONCEPTS OF COMPETITION WHICH WILL REQUIRE GREATER INITIATIVE AND JUDGMENT BY CONTRACTING OFFICERS. FURTHERMORE, THE WIDER USE OF FUNCTIONAL AND PERFORMANCE TYPE SPECIFICATIONS WILL REQUIRE

GREATER KNOWLEDGE OF THE MARKETPLACE AND CLOSER INVOLVEMENT IN DEVELOPING PROCUREMENT STRATEGIES.

ENSURING AN ADEQUATE PROFESSIONAL WORK FORCE TO MEET THOSE RESPONSIBILITIES WILL REQUIRE ATTENTION TO ALL PHASES OF CAREER MANAGEMENT -- FOR EXAMPLE, ESTABLISHING QUALIFICATIONS AND CLASSIFICATION STANDARDS, RECRUITING, TRAINING, ETC. IT WILL ALSO REQUIRE AN ACCEPTANCE BY OTHER DISCIPLINES WHICH PLAY A ROLE IN THE PROCUREMENT PROCESS, AS CONTRACTING PERSONNEL ASSUME A MORE RESPONSIBLE ROLE.

MANAGEMENT SYSTEM

THE FINAL THEME OF THE PROPOSAL IS THE MANAGEMENT SYSTEM WHICH TIES ALL OF THE ABOVE FEATURES INTO AN INTEGRATED STRUCTURE. THE MANAGEMENT SYSTEM INCLUDES THE UPDATED STATUTORY BASE WHICH OUTLINES SPECIFIC ROLES FOR OFPP AND THE AGENCIES. THE STATUTES ALSO SERVE AS THE BASIS FOR THE SINGLE GOVERNMENT-WIDE REGULATION. THE KEY INDIVIDUAL IN THE PROCUREMENT MANAGEMENT STRUCTURE IS THE PROCUREMENT EXECUTIVE, THE FOCAL POINT IN EACH AGENCY FOR THE FLOW OF AUTHORITY, RESPONSIBILITY AND ACCOUNTABILITY IN THE MANAGEMENT OF PROCUREMENT. THE PROCUREMENT EXECUTIVE WILL ALSO BE THE FOCAL POINT FOR COORDINATION WITH OFPP IN DEVELOPING GOVERNMENT-WIDE STANDARDS FOR THE PROCUREMENT SYSTEM, AND IN DEVELOPING GOVERNMENT-WIDE PROCUREMENT POLICIES.

LEGISLATIVE PROPOSAL

SPECIFIC LEGISLATIVE PROPOSALS, WHICH INCORPORATE THE SUBSTANTIVE STATUTORY REFORMS CONTAINED IN THE PROPOSAL, WERE SUBMITTED TO THE CONGRESS ON APRIL 30, 1982.

WE ARE PROPOSING AMENDMENTS TO THE ARMED SERVICES PROCUREMENT ACT OF 1947, THE FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT OF 1949 AND THE OFFICE OF FEDERAL PROCUREMENT POLICY ACT. WE HAVE NOT ATTEMPTED TO MAKE THE ARMED SERVICES PROCUREMENT ACT AND THE FEDERAL PROPERTY ACTS IDENTICAL, BUT WE HAVE TRIED TO MAKE THEM CONFORM SUBSTANTIVELY TO FACILITATE THE DEVELOPMENT OF UNIFORM GOVERNMENT-WIDE PROCUREMENT POLICIES AND A SINGLE GOVERNMENT-WIDE REGULATION.

THE OFFICE OF FEDERAL PROCUREMENT POLICY ACT, P.L. 93-400, WAS AMENDED BY P.L. 96-83 IN 1979 TO REQUIRE THAT OFPP DEVELOP AND SUBMIT TO THE CONGRESS A PROPOSAL FOR A UNIFORM PROCUREMENT SYSTEM AND A CENTRAL MANAGEMENT SYSTEM, AS WELL AS LEGISLATIVE PROPOSALS TO IMPLEMENT THOSE SYSTEMS. SINCE THESE REQUIREMENTS HAVE NOW BEEN SATISFIED, THE OFPP ACT NEEDS TO BE UPDATED TO CLARIFY OFPP'S FUTURE ROLE IN DEVELOPING GOVERNMENT-WIDE

PROCUREMENT POLICY AND IN PROVIDING LEADERSHIP IN PROCUREMENT REFORM THROUGH THE IMPLEMENTATION AND MAINTENANCE OF THE FEDERAL PROCUREMENT SYSTEM.

ONE FEATURE THAT IS IDENTICAL IN ALL THREE BILLS IS THE STATEMENT OF CONGRESSIONAL POLICIES. THESE POLICIES PARALLEL THE SIGNIFICANT OBJECTIVES AND FEATURES OF THE PROPOSED SYSTEM. THEY INCLUDE RELIANCE ON THE PRIVATE SECTOR TO FULFILL GOVERNMENT NEEDS, AND THE USE OF FUNCTIONAL DESCRIPTIONS RATHER THAN DETAILED SPECIFICATIONS TO TAKE FULL ADVANTAGE OF (1) WHAT THE MARKETPLACE HAS TO OFFER AND (2) THOSE INNOVATIVE SOLUTIONS THAT CREATIVE MANAGEMENT CAN PROVIDE.

FOUR OTHER CHANGES ARE WORTH NOTING:

- RAISING THE CEILING FOR SMALL PURCHASES TO $25,000 ACROSS THE BOARD. (THE ARMED SERVICES PROCUREMENT ACT WAS AMENDED BY P.L. 97-81 IN NOVEMBER 1981 TO RAISE THIS CEILING FOR THE DEPARTMENT OF DEFENSE, ONLY.)

- INCORPORATING THE TRUTH-IN-NEGOTIATIONS REQUIREMENTS OF P.L. 87-653 INTO THE FEDERAL PROPERTY ACT.

- ADDING A SECTION ON MANAGEMENT RESPONSIBILITIES TO BOTH THE ARMED SERVICES PROCUREMENT ACT AND THE FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT.

- TESTING NEW CONCEPTS OF COMPETITION.

WHAT APPEARS TO BE A SIGNIFICANT DIFFERENCE IN THE TREATMENT OF COMPETITION BETWEEN THE DRAFT LEGISLATION IN THE FEBRUARY 26 PROPOSAL AND THE LEGISLATION SUBMITTED ON APRIL 30 IS REALLY A MATTER OF FORM, NOT SUBSTANCE.

WE BELIEVE THE PROPOSED APPROACH TO COMPETITION IS SOUND AND THAT CURRENT CONCEPTS ARE OUTMODED AND SHOULD BE REPLACED. HOWEVER, SOME OF THE MAJOR PROCUREMENT AGENCIES HAVE EXPRESSED CONCERN THAT THE NEW APPROACH APPEARS TO BE SUCH A DRAMATIC CHANGE THAT IT SHOULD BE TESTED BEFORE IT IS MADE A PERMANENT PART OF THE CURRENT STATUTES. A TEST OF THE NEW CONCEPTS OF COMPETITION APPEARS TO HAVE A GREAT DEAL OF MERIT. IT WILL BE NECESSARY TO DEVELOP REGULATIONS AND PROCEDURES AS GENERAL GUIDELINES FOR THE TEST, AND PERHAPS TO MODIFY THOSE GUIDELINES AS THE TEST PROGRESSES. THUS, THE LEGISLATIVE CHANGES ULTIMATELY PROPOSED WILL BE BASED ON THE TEST RESULTS. CONSEQUENTLY, WE ARE PROPOSING ONLY THE LEGISLATIVE CHANGES NECESSARY TO CONDUCT SUCH A TEST.

EXECUTIVE ORDER NO. 12352

MANY OF THE IMPROVEMENTS CONTAINED IN THE PROPOSAL CAN BE ACCOMPLISHED, AT LEAST IN PART, WITHOUT WAITING FOR LEGISLATIVE CHANGES. TO INITIATE ADMINISTRATIVE ACTIONS, PRESIDENT REAGAN ISSUED EXECUTIVE ORDER NO. 12352 ON FEDERAL PROCUREMENT REFORMS ON MARCH 17, 1982. THE ORDER SETS FORTH THE PRINCIPAL ADMINISTRATIVE REFORMS CALLED FOR BY THE UFPS PROPOSAL. FOR EXAMPLE, IT DIRECTS THE HEADS OF AGENCIES TO DESIGNATE PROCUREMENT EXECUTIVES AND ESTABLISH CRITERIA FOR ENHANCING COMPETITION. IT DIRECTS THE SECRETARY OF DEFENSE, THE ADMINISTRATOR OF GENERAL SERVICES AND THE ADMINISTRATOR OF THE NATIONAL AERONAUTICS AND SPACE AMDINISTRATION TO CONSOLIDATE THEIR PROCUREMENT REGULATIONS INTO THE SINGLE FEDERAL ACQUISITION REGULATION BY DECEMBER 31, 1982. AND IT REQUIRES THAT OFPP WORK CLOSELY WITH THE AGENCIES IN IMPLEMENTATION OF THE REFORMS.

WITH ISSUANCE OF THE EXECUTIVE ORDER AND SUBMISSION TO THE CONGRESS OF SPECIFIC LEGISLATIVE REFORM PROPOSALS, WE HAVE MOVED FROM THE DEVELOPMENTAL PHASE OF THE UFPS PROJECT TO ITS IMPLEMENTATION.

THE PRESIDENTIAL EXECUTIVE ORDER, TOGETHER WITH AN ADMINSITRATION PROPOSAL FOR A UNIFORM FEDERAL PROCUREMENT

SYSTEM, PROVIDE A NEW PROCUREMENT BASE LINE. THEY CREATE A NEW ENVIRONMENT IN WHICH OFPP WILL WORK CLOSELY WITH THE FEDERAL AGENCIES TO REALIZE NEEDED PROCUREMENT REFORM. A MODEL CHARTER FOR AGENCY PROCUREMENT EXECUTIVES HAS BEEN PREPARED BY AN INTERAGENCY TASK GROUP LED BY THE NATIONAL AERONAUTICS AND SPACE ADMINISTRATION AND WILL SOON BE PROVIDED TO THE HEADS OF AGENCIES. THE APPOINTMENT OF PROCUREMENT EXECUTIVES IS A KEY STEP IN MOVING FORWARD WITH OUR PROGRAM TO IMPROVE PROCUREMENT ON A SYSTEMATIC BASIS THROUGHOUT THE FEDERAL GOVERNMENT.

FINALLY, I WANT TO NOTE AGAIN FOR THE RECORD, AS WE INDICATED IN THE FEBRUARY 26 PROPOSAL, THAT THE SUBMISSION OF THREE BILLS RATHER THAN SINGLE PROCUREMENT STATUTE SHOULD NOT BE INTERPRETED AS ABANDONING THE CONCEPT OR THE GOAL OF UNIFORM GOVERNMENT-WIDE PROCUREMENT POLICY. RATHER, IT IS A RECOGNITION OF THE DIFFICULTIES ENCOUNTERED BY PRIOR BILLS INTENDED TO ACHIEVE A SINGLE PROCUREMENT STATUTE. A SINGLE STATUTE WOULD PERHAPS BE IDEAL, BUT DOES NOT APPEAR TO BE ATTAINABLE. I BELIEVE WE CAN ACHIEVE NECESSARY SUBSTANTIVE PROCUREMENT REFORM WITHIN THE PROPOSED STATUTORY FRAMEWORK -- PARTICULARLY IN LIGHT OF THE PRESIDENT'S SUPPORT, AS EVIDENCED BY EXECUTIVE ORDER NO. 12352.

THE TIME IS NOW

BY REQUIRING THE PROPOSAL FOR A FEDERAL PROCUREMENT SYSTEM, CONGRESS HAS OPENED THE DOOR FOR MAJOR IMPROVEMENTS IN FEDERAL PROCUREMENT, INCLUDING AN UPDATE OF THE STATUTORY BASE. AN OPPORTUNITY LIKE THIS MAY NOT ARISE AGAIN FOR MANY YEARS. THE ADMINISTRATION BELIEVES THAT ITS PROPOSAL IS A REALISTIC, WORKABLE RESPONSE TO THE MANDATE OF CONGRESS FOR MEANINGFUL GOVERNMENT-WIDE PROCUREMENT REFORM. THE PRESIDENT HAS ALREADY TAKEN A SIGNIFICANT STEP BY ISSUING AN EXECUTIVE ORDER. THE HOPE IS THAT CONGRESS WILL MOVE PROMPTLY TO ENACT THE LEGISLATION NECESSARY TO FULLY IMPLEMENT THE PROPOSAL.

MR. CHAIRMAN, THAT CONCLUDES MY PREPARED REMARKS. I WILL BE HAPPY TO ANSWER ANY QUESTIONS THAT YOU OR MEMBERS OF THE SUBCOMMITTEE MAY HAVE.

Senator DANFORTH. Next we have three former OFPP administrators, Hugh Witt, Lester Fettig, and Karen Williams.

Who would like to start? Mr. Witt?

Mr. WITT. We will go chronologically if it is all right with you—the oldest in many ways, sir. [Laughter.] Thirty-one years in Washington—I think I've got these younger people beat here.

Senator DANFORTH. Please proceed, Mr. Witt.

TESTIMONY OF HUGH E. WITT, VICE PRESIDENT, GOVERNMENT LIAISON, UNITED TECHNOLOGIES CORP.; LESTER A. FETTIG, INDEPENDENT CONSULTANT AND AUTHOR; AND KAREN HASTIE WILLIAMS, OF COUNSEL, CROWELL & MORING—ALL APPEARING AS FORMER ADMINISTRATORS OF THE OFFICE OF FEDERAL PROCUREMENT POLICY

Mr. WITT. My statement is rather brief, Mr. Chairman. I understood that is basically what you wanted so that you could come at us from different directions during the question and answer period. I've been here before, and I will be glad to try any experiment that you feel is appropriate in getting information.

I appreciate the opportunity to be here, and I can say that genuinely, to give you my views on the viability of maintaining a focal point for Government-wide policy guidance and enforcement in the

Office of Management and Budget—specifically, a focal point to deal with Federal procurement.

I would like to say that I agree it is most appropriate for a panel of this composition to be before you, since our stewardship encompassed most of the life of the Office of Federal Procurement Policy since its inception in January 1975. Also, I, as the first administrator, had different kinds of problems, faced different issues, than my two successors. Thus, we can discuss the subject of your hearings from varying perspectives, meaning they didn't have to go through the startup period. They didn't walk into an empty room and find a desk and a chair and two people. That is where I started.

I would like to make clear at the outset that I speak here today as a private citizen, not for my employer or the associations and groups with which I am affiliated. Naturally, my opinions must be colored by my 26 years in the Federal Government, including over 2 years in the Office of Federal Procurement Policy, plus some 13 years in the private sector.

I must confess that in preparing this statement I did take a look at my testimony before your predecessor subcommittee—the one on Federal Spending Practices and Open Government—on March 2, 1979, just 3 years ago—and I was at the tender mercies of Mr. Chiles.

I stated at that time that I had reviewed the pros and cons of continuing OFPP, including a critical evaluation of some of that office's policy issuances. On balance, I concluded that it was in the Government's best interest, as well as those doing business with the Government, to continue to support the OFPP concept.

At the risk of sounding self-flattering, I do not feel that the events of the last 3 years have destroyed the rationale on which I based my statement in 1979.

For instance, I stated the following: "In my opinion, the acquisition process, and its related functions, is too important to be left to a fragmented decisionmaking process. A central office, looking across all agencies, goes far to solve that problem." I have no hesitation in standing behind that statement today.

In fact, procurement and the acquisition process continue to be a lightning rod for the Congress, the General Accounting Office, and the media—especially the media at many times. There is no other subject which has had as many words written about it by those who know so little about it.

The very fact that the Congress, in 1969, saw fit to create a special commission to study procurement in depth for over 2 years demonstrates the special attention given this subject in the past.

What was the first subject that the current Secretary of Defense and his deputy focused on after they were sworn in? Procurement. We now have the Carlucci Initiatives, an ongoing effort to improve the way in which the biggest Federal agency buys its goods and services.

And, sir, after 23 years with the Department of Defense, I know what they are talking about.

The Congress continues to create special committees to look at procurement. There were a couple in the House last year, if I remember correctly. Legislation of varying quality is thrust into the hopper year after year, attacking some part or other of the procurement process. We keep getting nibbled away.

On March 17, President Reagan signed an Executive order, which we have discussed earlier, on reform of Federal procurement practices. And he noted that Federal procurement amounted to $134 billion a year or one-fifth of the budget. I agree with the President that it deserves special attention.

In 1979, I also said that OFPP served as a point where initiatives can be taken which would not be taken if left to the various agencies. Also, the cross-fertilization of ideas and concepts can be promoted by OFPP across the Government. I see no other office which could appropriately serve these purposes.

Last, Mr. Chairman, I want to mention the people involved in this $134 billion process. Government procurement has become a very sophisticated, technical business, especially in reaction to the criticisms which have been leveled at it over the years, and the voluminous controls which have been loaded on to the process in answer to these criticisms. And I would say, sir, that the Congress certainly can be pointed at as far as loading down the procurement process. You gentlemen have really loaded it down. Accordingly, better educated, better trained, and more dedicated people are required to make the system work. A focal point such as OFPP, located in the Executive Office of the President, can assure that the personnel policies for these people receive the attention, indeed the priority, they must have. It would be pointless to carefully and laboriously develop a better system and improved procedures, only to place them in the hands of a poorly trained and weakly motivated work force. The Office of Federal Procurement Policy, or something like it, is absolutely essential to champion the cause of Federal procurement personnel so that they evolve into an increasingly professional cadre in the future.

I thank you for this opportunity to speak on such an important issue and will be glad to answer questions.

Senator DANFORTH. Mr. Fettig.

Mr. FETTIG. I, first off, like Mr. Witt, want to say thank you for the invitation. This, too, is a familiar setting for me, not only having appeared many times as administrator, but also prior to my appointment serving as staff director for this subcommittee for nearly 4 years under Chairman Chiles. I have gone through, I think, nearly 100 days of hearings over 10 years of my professional life, since the Procurement Commission, of this committee, including the struggles we had passing the OFPP Act in the first place back in 1973. I hope that combination of background will color your reception for my remarks.

I might also point out that prior to those activities I began as an aerospace and systems engineer with industry doing defense work and over the last few years have again returned to private activity, working with clients from major defense contractors on through small and minority business.

All of that experience is behind the comments I'd like to make this morning.

I will dispense with the litany of how important the subject is and only punctuate it with an anecdote. During my term as administrator, I got a call from the State Department one day asking me to make time in my schedule for a Russian exchange student—who was 52 years old. It seems the gentleman had written a book and claimed he had found the secret and the hidden central planning mechanism for the American economy. He was very intense about it. The subject was OFPP and how, through the contract mechanism, the White House was centrally managing the American economy.

I disabused him of the notion, but tried to point out that a continuing advantage we enjoyed in our sometimes friendly contest was that we did have a private sector to rely on; we did have ingrained competition; we did have the strength that that embodies in innovation. That's the true measure of importance; we have a Government that does rely on those exceptional qualities in the private sector.

When we do badly at it, we terribly burden the country, particularly in defense.

I want to address three specific points: the status of OFPP; the relationship between OFPP and the Defense Department; and, finally, my own views on how this committee and the administration might proceed.

Overall, I would echo your preliminary sentiments that the administration could have been bolder. Again, to be polite in public hearings, my own choice of words would be "terribly disappointing."

The notion that we need to test many mechanisms overlooks, I think, a number of facts that have occurred in the 10 years since the Procurement Commission came up with what were good ideas for reform.

OFPP, itself, is a test. So when we see a legislative proposal, as was put forward last Friday, which basically emasculates the directive authority of that office, you have to ask yourself, "What grounds are there for that?" We've had experience with OFPP. We have three former administrators sitting here today.

Just as in 1973, a gentleman named Frank Zarb sat here, while Senator Chiles and I sat there. OFPP was not needed. The Nixon administration promised they would revitalize the system. Executive Order 11717 was issued to placate congressional impatience.

The arguments for not having a strong OFPP, with directive authorities, were not bought by the Congress then, and I don't believe should be bought today—even less so because we've had the experience.

For those who so fear directive authority in that office, we need to point out those fears have been ill-founded. There has been no collapse in agency mission performance. There has been no heavy-handed intervention in contract award decisions. I think my colleagues here at the table will confirm that there has not been a single instance of an OFPP administrator dictating a policy. The nature of the beast requires consensus. And in the end, any agency head, be it the Secretary of Defense or the Administrator of EPA, has plenty of recourse to countermand that overwhelming authority by simply picking up the phone and talking to the OMB Director or the chairman of the oversight committee on the Hill, which happens many times and did during my tenure.

The next subject: OFPP's relations with the Defense Department. I know there has been a great deal of adversarial posturing. A lot of people look on the current situation as a contest between the Defense Department and OFPP, perhaps OMB. I don't look at it that way at all. The Defense Department, let me say, for all of my experience, runs the most effective, efficient, and professional acquisition operation of any agency in this Government. Let me also add that NASA deserves that rating as well.

They too often, for reasons of national priorities and for media expediency, take a beating for contract actions that are poorly performed and should be corrected. Let's start with the premise that the Defense Department does one hell of a good job in managing the huge amount of contract activity it does. Using that as a takeoff point, though, this is why I am personally very disappointed: The Defense Department rightfully ought to be stepping up to take a leadership role, hand-in-hand with OFPP, rather than appearing to one to take their ball and go home, leaving very little behind. I think that posture, be it consciously taken or not, leaves the impression that the Department is self-indulgent, petty, and mean-spirited. And for other reasons, it does dishonor to so many DOD officials that have worked effectively on joint reforms. I feel obligated just to mention a few of them.

There wouldn't be a now almost completed Federal Acquisition Regulation, which I instituted, without the deputy for acquisition management, Dale Church, having agreed to do it. Forty Defense professionals made that project hum. An Air Force colonel, John Slinkard, and a Navy captain, Vince Pistolessi, directed it.

A Navy admiral gave us the improvements we did get in commercial products, everything from meat, fish, and boxer shorts. An Army colonel, Justin Holmes, also gave us commercial product improvements.

Air Force General Toomay put the mission requirements into the Air Force planning system mandated by OMB Circular A-109, and another general rewrote DOD Directive 5000.1 to implement the new process. Today, a Navy captain, Walt Carson, has saved us $3.5 billion on the ASPJ program by conforming to OMB Circular A-109 principles.

A Defense civilian, Joe Canata, gave us the Federal Procurement Data System.

All of this makes me disappointed that the Defense Department is not willing to seize the prospect, to step up to take a leadership role in unison with the Office of Federal Procurement Policy.

As for the notion of testing, all of the examples I have just cited serve another purpose to say with all that experience we should be insulted by the notion that all of these mechanisms need to be tested further. As it stands, we can consider it a laughable position.

As for the future direction, I would also point out that the difficulty in proceeding from here—both in maintaining OFPP's directive posture and in moving toward a truly consolidated acquisition framework in the statutes—is as much a problem for the Congress as it is downtown and across the river.

Mr. Danforth, I'm sure you perceive, from your experience in Missouri, that there is an underlying discontent that people feel when they see the behavior of our Government. They don't have a taste for partisan or bureaucratic squabbling anymore. That is what we are seeing here. Contract reform is a microcosm of that impatience with bureaucrats who are too worried about turf and not worried enough about some higher goals that are achievable if we will sit down and work together.

I would suggest, therefore, in closing that two things be done. That a meeting of the minds be made, certainly with your leadership. Your role goes without saying, Mr. Chairman. But I see no reason why along with you, Mr. Tower, Mr. Price, Mr. Roth, Mr. Brooks, Mr. Weinberger, and Mr. Carlucci couldn't sit down and agree that: "Yes, we will move forward promptly, not to a test, not a 3-year limbo status for mechanisms we know will work." Even if shared in a phone call, thereafter a statute can be drafted promptly. We have plenty of models on the books already.

Grant that the Defense Department is going to have a heavy hand in crafting the particulars; grant their status as the No. 1 procuring agency with perhaps the most vital mission to perform—even with those concessions, the net result is going to be a vast benefit to the community at large, particularly to small businesses.

Second, I would strongly urge that OFPP not be deterred by removing its directive authority as is being proposed by the administration.

And in saying that, I would finally like to extend my compliment to you for sitting through 6 days of hearings. To be effective, it will take at least several more. I would urge you to continue.

Thank you.

Senator DANFORTH. You were at it for how many years, 11?

Mr. FETTIG. Ten years now.

Senator DANFORTH. Ten? It seems like 11? [Laughter.]

Mr. FETTIG. Yes, sir.

Senator DANFORTH. Thank you very much.

Ms. Williams.

Ms. WILLIAMS. Mr. Chairman, let me also express my appreciation for the opportunity to testify today on the 1982 version of the proposals for procurement reform.

I come to the witness table not only as a former Government official but also as an active practitioner in the Government contracts bar representing a large range of clients from small R&D firms to large defense contractors.

My thoughts today are my own and not those of my clients or my law firm, but I hope that this perspective will help the committee as it considers the administration's proposal and the appropriate role for the Office of Federal Procurement Policy in procurement policy reform.

I will try not to tread over the same ground that you have just reviewed with my two predecessors. Let me say that I think that we have shared mutual experiences, and I would endorse many of the statements made by both. Rather, I will focus my remarks today on potential problem areas that I see emerging if OFPP fails to support a strong leadership role and a strategic position for that office in centralized procurement policy.

I would say that these problems fall into three categories: the philosophical, the administrative, and the practical. You have already talked about the procurement environment and background with Senator Cohen and my predecessors. So, I will just move on to a discussion of what I think is behind an attitude from which Government is now suffering. Many contractors are simply removing themselves from the Government contracts arena and eroding that "industrial base" that we hear so much about.

OFPP has recognized this problem. It has recognized the cumbersomeness and the costly and frustrating aspects of the current procurement policy. And yet, having made that statement and observing that we've studied this problem enough, it now brings to the Congress legislative and management proposals which I fear emasculate the current strength of OFPP and leave it in a severely dibilitated position.

There is no question that there is a need for reform. I think the issue is: What philosophies will shape that reform? I think the arguments generally fall into two categories: those who would support a decentralized approach and those who would support a centralized approach. I think under a decentralization scenario you have a situation where there is an agency procurement executive who sets standards for internal processes and generally oversees policy administration within that system, tailoring policies to agency missions. Procurement authority is still vested in the agency itself and delegated through existing operating channels.

The Department of Defense, as we've discussed, as the agency with the largest dollars involved in the procurement process, would retain major procurement policy autonomy under the proposals submitted by the Office of Federal Procurement Policy.

As I read the current proposal, OFPP sits in a so-called coordinating position devoid of any substantive authority to push forward the policy directives it issues. Relying on this coordination role alone would appear to me to leave OFPP in an extremely vulnerable position—vulnerable to recalcitrance on the part of one or more agencies that can create immovable roadblocks to going forward with meaningful reform.

I think when you look to a centralized management approach, you have there an opportunity to invest OFPP with strong management and regulatory authority. This is the directive authority to which Mr. Fettig referred earlier. OFPP had such authority in the past which supported its policy role both with the military and the civilian agencies. In developing policy directives, it would then continue to consult with agenices and the public to develop a consensus, a broad spectrum of views. But once issued, a policy directive would be implemented authoritatively with the kind of management and regulatory followthrough necessary to see that the policy is put in place.

It seems to me that the development of a single statute to create the necessary policy and procurement reforms would be essential to a centralized role.

Let me be clear. I am not talking about OFPP getting into the agencies' internal operations. I think it would be wrong for OMB and OFPP to try to run the day-to-day operations for the Defense Mapping Agency or for the Forest Service. Rather, it seems to me, with the authority to resolve rather than facilitate resulting conflicting views among agencies about a proposed regulatory change, OFPP would be able to establish a regulation to, for example, guide agencies in setting priorities for commerical product buys, for establishing functional specifications, etc.

These are just a few of the areas that I think, from a philosophical approach, create problems. It follows that a threshold determination that this committee and the Congress will have to make will be: What approach is the appropriate one to take? What is best for the country? And what is best for progress in the procurement reform area?

Turning to the administrative side, it seems to me that the administration's proposals for OFPP would reduce that office to little more than a housekeeping function.

I am troubled by numerous features of the proposal, but I would mention just a few. The proposed legislation sets no statutory authorization level. Under current law, OMB would be the entity then to set the appropriate level for funding. It would seem to me that an independent OFPP administrator would certainly stand a better chance of successfully defending efforts to cut back on his or her budgetary levels armed with a statutory authorization level than does an administrator left to the largess of an OMB Director who may or may not appreciate the importance that this committee appreciates for procurement policy issues.

In addition, as you have already discussed, in spite of statements about overstudying, we have another 30-month testing period proposed. It seems to me this introduction of further testing suggests that the administration is not sure as to whether there is any fundamental change required in the procurement system.

And finally, as I read the proposal, there is no guarantee that any agency will actually follow through with the testing of the competition concepts, commercial practices, or raising of the thresholds as advocated, but not mandated, in the administration's legislative proposal.

From a practical standpoint, Mr. Chairman, I think OFPP faces an uphill battle with respect to its very existence and, indeed, its role in achieving procurement reforms. Industry is divided on these new proposals. The agencies are divided on their support or opposition to the proposals. Members of the bar are divided on these issues. Some have expressed grave concern as to what the real outcome of the new concept of competition will be.

One of my colleagues has recently published an article on the issue of competition looking at it from an economic standpoint. I would request that article, which was appended to my statement, be included in its entirety at the end of my statement for the consideration of the committee.

In conclusion, Mr. Chairman, let me say that I think that if ever there were a time for OFPP to take the reins of procurement policy power it would be now. We see OMB's star rising. We see OMB budgetary considerations playing a key role in all major policy and regulatory considerations in this administration. As an arm of OMB, OFPP should, it seems to me, be in a posture to benefit from the strong role that OMB is playing. It seems to me it is in the interest of all procurement professionals and all those who have interest in the procurement community that OFPP take a more activist role. OFPP was established in 1974 as a catalyst for change.

It seems to me it can either shape the future or be shaped by the future.

As the debate continues over the next several months and as the committees of the House and Senate look at these new proposals, I would hope that OFPP will use this time wisely to look at major policy issues that confront that office today.

There are policies that are in place that are being eroded by piecemeal legislative and administrative actions. For example, just to mention a few:

The contracting-out policy set by OMB Circular A-76, ratified by the recent Executive order and endorsed many times by this committee, is under seige in the House of Representatives. OFPP should be taking a leadership role to educate Congressmen about the importance of this issue.

Heavyhanded procedures by Inspectors General and audit teams are threatening contractors and threatening the independence of contracting officers.

A proposal to move the Federal Acquisition Institute out of OFPP and into another agency would appear to undermine the importance of that agency, especially at a critical time when we are talking about increased discretion for contracting officers and the vital need of improving professionalism among our procurement work force.

OFPP stands at a crossroads in its history. The Congress has the opportunity to champion independent, centralized policy development as a keystone for procurement reform. I believe that a strong OFPP is pivotal to such development and that only with a strong OFPP to balance the interest of the public, the interest of all the agencies, and the interest of the private contracting community can we ever hope to improve and streamline the procurement process.

Thank you, Mr. Chairman. I will be happy to respond to your questions.

Senator DANFORTH. Well, thank you all very much for your very useful testimony.

Your testimony, Ms. Williams, is very clear. You think that the administration's proposal weakens the hand of the OFPP?

Ms. WILLIAMS. Yes, I do.

Senator DANFORTH. It does not provide it with the tools that it needs to do the job?

Ms. WILLIAMS. That is correct.

Senator DANFORTH. Do your two predecessors agree with that assessment or not?

Mr. WITT. I don't view it with quite the degree of alarm that Karen does. It seems to me that we have to remember where we are Things change in the Senate and the House. You have to remember that you are operating in different environments year in and year out. Certainly, things changed when the Republicans came in, as you well know, Mr. Chairman. Things took on a different atmosphere, and so forth.

We see a sense of decentralization by the President in many ways. We see a sense of decentralization, certainly within the Defense Department where the Secretary of Defense seems to want the military people to have a stronger hand in making their own decisions—make decisions down closer to where the action is and all those goods words.

So different ideas of management, you know, come and go around Washington over the years. You have to remember, too, Mr. Chairman, that some of this atmosphere that we are now dealing in can be laid at the foot of the Congress. There has been a certain amount of clash, as we know, between committees over on the House side; in some ways OFPP has been caught in the middle. Let's just lay it on the line; that's happened.

So times change. People running the Congress change, and they have different ideas on how to do things. I helped get something started on a single bill way back there. OK. We never have had a single bill; Les and some of us struggled trying to get a bill going. And then I struggled with the distinguished Mr. Chiodo, who is with us today, trying to get legislation through. And every time we would see a different draft; things would change as it was massaged by you gentlemen up here on the Hill. At that point I was looking at it from the industry side. I saw a different sort of a draft each time. So, it was very difficult to decide on what the Congress really wanted.

Accordingly, due to the clashes and different ideas of philosophy by the Congress, we, in industry—the last several years—never were able to decide on a bill that we could support, very frankly. And frankly, I don't think this bill is going to go anywhere this year. Not that you asked my opinion, but I just thought I would mention that I don't think it will be going anywhere this year. [Laughter.]

So, I think you have to work with what you have. Don Sowle does, at least, have a statement by the President, signed by the President, saying that he wants some reforms made and he wants OMB, using OFPP, to see that they are carried out.

Now, you can use a lot of different words. You can use "directive power." But as Les says, you don't direct anybody over in OMB really. You have to use different ways to get what you think is best for the country. Working with the DOD, certainly, presents an interesting denouement, if you will.

I think Les has a good idea that Don Sowle could go hand-in-hand off into the twilight with the Defense Department. [Laughter.]

But I am reminded of the story about P. T. Barnum. Somebody came to him with an act and said, "I've got this dandy, fine act here. We're going to put a lion and a lamb in the cage together." And Barnum said, "It will work if we don't run out of lambs." [Laughter.]

Senator DANFORTH. Let me repeat my question. [Laughter.]

I enjoyed the historical perspective, but I think really the issue is: Does this proposal strengthen or weaken the hand of OFPP? Ms. Williams says that she believes that it weakens the hand of OFPP to its detriment and to the detriment of the Government. We have got to decide where we go from here. Do you think that it strengthens or weakens the hand of OFPP?

Mr. WITT. The words are not as good as the words were that I started out with. Public Law 93-400, it seems to me, had some stronger words than what we are ending up with here. But as I say, I think you have to roll with the punch.

And you can get an awful lot done with the words that are in the Executive order. And if the President and the Director of OMB are behind Mr. Sowle, he can get a lot of things done. There is no question about it. I think we all have to admit that that is where the power comes from. I think that Congress was wise, frankly, in putting the OFPP within the Office of Management and Budget. I wasn't sure when we started out, but I think that was probably a wise move.

Senator DANFORTH. What is your view, Mr. Fettig?

Mr. FETTIG. I will forthrightly say, "weakens," Mr. Chairman, without question. And more importantly, the reduction in directive authority is exactly—depending on how you want to look at it—the raw meat you need to throw to keep the lion fed or to fend him off from the lambs.

Under the best of circumstances, even with directive authority, there was no marching off into the sunset. If there had been a fly on my office wall and on those of some in the Defense Department, there would be a record left that would require a lot of deletions. It was always a difficult proposition to work jointly with DOD. But given the authority and stature of OFPP, it was always possible to command a compromise and hence some progress. No agency, be it DOD or GSA, felt they had the latitude simply to turn their back, walk away, and ignore needed reforms as long as that authority was there. Hugh makes a very good point, too, that another essential ingredient is having the sympathy and the ear of your OMB director boss. But both are necessary conditions, in my view. The record should really not be allowed to stand with anything but a clear recognition that these proposals would devastate OFPP's authority.

Senator DANFORTH. Do the three of you view the test idea as kind of a "killer" idea?

Mr. WITT. It may not kill it; it might drag its life out a little longer than otherwise. It would be certainly extending the time that you are looking at things, no question about that.

Senator DANFORTH. Suspended animation.

Mr. WITT. Now, if Mr. Sowle is convinced, in the atmosphere in which he has to deal, that it is time for a test, I certainly think he has the right to say so.

Senator DANFORTH. I do not think he did say that. I think the test idea was, as my guess, foisted upon him.

Mr. WITT. I don't know the inner workings of the administration, sir.

Ms. WILLIAMS. Mr. Chairman, I would think that a testing period, as I stated, is troublesome because it does seem to extend the time before we really get to having some fundamental change. It might be effective depending on the commitment of the agency head involved and the willingness of the agency head to really make it a fair test. There are tests and then there are tests. I think there are a lot of intangibles. Regrettably, the statute as proposed doesn't really give you enough meat. It doesn't tell you how the test is going to work, what sort of feedback mechanisms you are going to have, and most importantly what you'll do with the results once you get them.

Senator DANFORTH. So your answer is that you think that it is a "killer," or you just think it is unnecessary?

Mr. FETTIG. I think both. It is a killer: It gives everybody an excuse to say, "We don't know enough. Wait for 30 months downstream when we get another report." And it is unnecessary. I must reiterate that there are people in the audience today that could probably reach into their briefcases and document for you the results of our "tests."

Dan Wilson sitting back there and I, working with GSA and DOD, threw out about 1,000 detailed specifications. As I remember the figures, the Defense Department saved $797,000 on T-shirts the first time they contracted after switching to a functional specification. These are not theological attempts, daydreams about competition. The tests have been there. In my prepared statement I have other examples. The testing requirement has to be seen as a ploy, I would say.

Senator DANFORTH. Let me ask you for your practical advice. I haven't been at this for 10 years, but I have been at it for more than a year. We have had numerous hearings; we have more scheduled. I agree with Mr. Witt; we'll finish the hearings and then may or may not get something through a markup. We've got other matters that we've got to deal with on the floor of the Senate. We have problems in the House. The thing just goes on and on. I would be willing to fight the fight and spend a lot of time on it provided that we would be coming out with something at the end that is really worth something.

My question to you is: Are these legislative proposals worth the effort?

Mr. FETTIG. If I might respond, I would say no. But neither is the reform process one where a surge of effort has to be applied, then withdrawn with a major accomplishment. Rather, I think the time constant for reform of the magnitude we are talking about here requires a commitment to a lower, steady-state level of commitment. Just because there is no way to get a consolidated statute out in this session of Congress—indeed in this Congress—doesn't mean that some very essential groundwork can't be laid.

I think the most important groundwork needs to be done by you personally and your colleagues—to chat with Mr. Tower, Mr. Price, Mr. Brooks, Mr. Roth, and particularly those Members that have joint membership on Defense Appropriations, Armed Services, and Governmental Affairs. I can't see that any of them would disagree with the basic postulation that says: Look, the administration has really come up with something that is not worth our time and effort, but all of us have a lot to gain if we go further. Can we agree that we are going to ask the Defense Department, OMB, and the administration to roll up their sleeves? Let the Defense Department have a clear, strong voice in what they come up with. But by the beginning of the next Congress, let's all exert our small reservoir of energies to something that is truly meaningful.

What we have here is unacceptable. It would probably just give people excuses. I don't want to turn around and say that all the effort I've put in so far has just come to naught.

Plus, I would strongly inject—and I hope my article will be included in the record[1]—that this makes all kinds of good political sense as well. This is the type of good government issue where everybody can benefit, both individual members who had a strong role to play in advancing it——

Senator DANFORTH. Right, but we've got a bill before us right now. After much tugging and pulling, we finally have an administration bill. And the administration has said, "We want this passed." If this is the administration's legislative proposal and that is the most OFPP can get out of DOD—and it is not as though they didn't talk to them—this is it. This is what they have come up with.

At least two of you have testified that it will weaken the hand of OFPP. All agree that it doesn't enhance it. And it proposes a series of tests that seem pointless. Why push it?

Mr. FETTIG. Well, I can only refer to a motto I have picked up along the way that says: "The game is never over in this town." This is an administration response to some pressure.

In the end, the administration still opposed passage of the original OFPP Act. There was some talk that they finally might have vetoed it. They didn't. We moved forward. I think there is still room for more progress to be made given recent——

Senator DANFORTH. You mean, like Sisyphus, I am perpetually doomed to push this rock up the hill?

Mr. FETTIG. You have been talking to Senator Chiles, I see.

Senator DANFORTH. It makes me feel like throwing the next election. [Laughter.]

What is your view, Ms. Williams?

Ms. WILLIAMS. Mr. Chairman, I would think that there is a role that can be played now, as you suggested. The administration has submitted a piece of legislation to the Congress. This town runs from both ends of Pennsylvania Avenue. It seems to me it is now appropriate for the committees of the Congress to review this matter. Of course, it is a piece of legislation that involves more than just the Governmental Affairs Committee—perhaps building on Mr. Fettig's suggestion not only for you to sit down and talk with Mr. Tower and Mr. Roth and Mr. Brooks and Mr. Price, but perhaps developing something along the line that was developed by the Congress when the energy legislation, that had a major impact on a number of committees, was before the Congress several years ago. This format was an ad hoc committee, if you will, of the Congress with key congressional representatives and staff. The staff people sat down and looked at a draft, following directions from the principals. The members of the ad hoc committee could see what could be developed as far as realistic procurement reform that would muster full support of the Congress.

I certainly wouldn't want to see this effort abandoned. A lot of time, a lot of effort, and the work of many well-intentioned people have been put into this proposal, as you well know. Since 1972 and the work of the Commission on Government Procurement, we have been pushing reform uphill. I would not want to see the effort abandoned. But I do think that perhaps now is the time for the

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[1] See p. 102.

Congress to get more actively involved in developing an alternative. Certainly, I would think that private sector individuals who are concerned with this issue would be willing to offer help and share whatever efforts that have been done in the past that could be helpful in this regard.

Senator DANFORTH. Mr. Witt.

Mr. WITT. Mr. Chairman, I am glad to see that my colleagues have come around to my way of thinking. They come on strong and they say, "Everything is going to hell in a bucket." And then you push them to the wall, and they say, "Yeah, but we have got to keep on working on it." That is all I was saying. We have got to keep working at it. I am glad that they agree with me.

Thomas Payne said: "Time makes more converts than reason." [Laughter.]

We really have brightened your day, haven't we? [Laughter.]

Senator DANFORTH. Time sure goes by slowly. [Laughter.]

Thank you very much.

Ms. WILLIAMS. Thank you, Mr. Chairman.

Mr. FETTIG. Thank you very much.

[The prepared statement of Mr. Fettig, with attachments, and of Ms. Williams, with the Federal Bar News & Journal reprint, follow:]

Not for Release
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2:00 pm May 5, 1982.

Prepared Statement
of
Lester A. Fettig
Former Administrator
Office of Federal Procurement Policy

Before the
Subcommittee on Federal Expenditures
Senate Committee on Governmental Affairs

Thank you for this opportunity to appear again in a familiar setting. As OFPP Administrator between 1977 and 1979, I had numerous occasions to come before this committee. Moreover, as the Subcommittee's Staff Director from 1973 to 1977, I was privileged to play a role in the complete range of procurement reform initiatives under then-Chairman Lawton Chiles -- including passage of the original Office of Federal Procurement Policy Act in 1974.

I would like to address my remarks to three subjects:

(1) The status and authority of the OFPP;

(2) The relationship between OFPP and the Defense Department; and

(3) The scope, pace and direction of continued reform in Federal contracting.

Background

This audience does not need any introductory litany of how important Federal contracting is to our scheme of government. The numbers, the dollars, the impact you've all heard before. Suffice to say that this mechanism is one of the things that makes the American system of government truly unique: The notion that we can harness the competitive private sector to serve public needs. How we do it -- and whether we do it well -- has a great deal to say about Alexander Hamilton's Federalist admonition that "The true test of a good government is its aptitude and tendency to produce a good administration."

For many years now, commissions, committees and independent observers have given our system of contracting failing grades in Mr. Hamilton's test. And even those who properly conclude our contract system earns passing grades still hope for excellence, to do so much better when we know we can.

Against this backdrop, the Reagan Administration's proposals for the OFPP and legislative changes are terribly disappointing.

The Office of Federal Procurement Policy

With all the talk now about timid "testing" of new contracting methods, perhaps it's well to observe that OFPP itself was and is a test. It was established on a "sunset" basis to see whether it could serve a worthwhile purpose. There is no doubt whatsoever that it has. But the ingredients for success in the past are very much in jeopardy for the future.

The key ingredient is directive authority. We struggled with that notion during the Nixon Administration. During our 1973 hearings, Mr. Frank Zarb presented the Executive Branch view that an OFPP wasn't necessary. Instead, they proposed a "revitalization" of the current system and had the President issue an Executive Order 11717 to fill the breach in waning congressional patience with promises to do better.

With no small sensation of deja vu, the Reagan Administration today has issued a new Executive Order 12352 while proposing the emasculation of OFPP's authority. The legislative proposals released last Friday would leave OFPP at best as a innocent bystander to attempt to reconcile differences between Defense, GSA and NASA -- while even it's "policy" authority would be subject to an apparently unilateral rejection by an agency which felt it's missions were being adversely affected.

Now, is this a scheme to bring strong central leadership to our contracting system? Everyone agrees that is what we're after. But it is a scheme which the Congress rejected in 1973 and which it ought to reject now as well for even additional reasons.

First, then as now, and I speak from intimate personal experience, without that directive authority in statute behind the Administrator, even the most mundane chores would be difficult. Spearheading a particular reform simply could not be done without it -- no less establishing a uniform Administration position on contracting issues.

Second, those who seem to so fear OFPP's directive authority should look at the record during the period it was exercised. There was no collapse in agency mission performance, there was no heavy-handed intervention in contracting decisions, there was no unilateral dictum passed down with no consultation and consensus.

Indeed, because OFPP was vested with strong authority during my tenure, the agencies could look to OFPP as an ally and proponent for changes they deemed desirable. As often as not, I was criticized for OFPP not opposing agency positions.

The fact of the matter is that evn with directive authority, any future agency head retains ultimate authority by virtue of his or her ability to simply pick up the phone to talk with the OMB Director. The restrictions being proposed on OFPP now are entirely unnecessary, an overkill, if you will, and likely to eliminate the prospect that OFPP can ever again play a strong central leadership role.

Relations with the Defense Department

Others see a vast contest between DoD and other agencies for dominance in procurement. My view is somewhat different. The current proposals before you strike me not as some kind of bureaucratic 'victory' for Defense, but rather a sad withdrawal from responsibility in shared leadership and expertise.

Let me say first that from having dealt with virtually every executive agency, the Defense Department maintains the most professional, accomplished and effective acquisition system of any. The reasons are obvious: the size, number of transactions, complexity of the goods and services acquired, the crucial reliance on contracts to meet defense mission needs. (I would have to add that, although much smaller, NASA deserves the highest ratings, as well.)

Sadly, it is the Defense Department which should be offering to support and contribute to a modern overhaul of our contracting system. They have so much to offer -- and the record during my tenure proves it.

The honor roll of people who already brought government-wide improvements includes so many Defense officials:

o The Federal Acquisition Regulation Project which I initiated to replace over 600 different sets of regulations simply could not have been done without the leadership of then-Deputy for Acquisition Management Dale Church;

o The FAR writing could not have been done without a dedicated team of 40 DoD professionals led by Air Force Colonel John Slinkard and Navy Captain Vince Pistolessi;

o The mission planning requirements of OMB Circular A-109 would not have been so well emplaced without Air Force General Toomay;

o Simplified specifications, more competition and lower prices for commercial products would not have come about without Army Colonel Justin Holmes;

o Reforms in susbsistence procurement-- meat, fish -- would not have happened without the leadership of Navy Admiral Stu Platt;

o We would not have a centralized Federal Procurement Data System operating today if I didn't have the expertise of defense personnel to do it, civilian Joe Canata in particular.

The list could go on and on.

And as for "tests" of more effective competition, let it be clearly noted that we already have a record of successful testing in all these cases and others. Navy Captain Walt Carson has saved us $3.5 billion in the Advanced Self-Protecting Jammer (ASPJ) program by using A-109. The Defense Department is today saving hundreds of thousands of dollars on everything from boxer shorts and T-shirts to fishsticks.

The Administration's proposal that we "test" some of these modern methods for effective competition would be insulting if not so ludicrous.

As for the potential political benefits, these are addressed in a recent article which I have attached.

The main point is that DoD has much to contribute to a modernized Federal procurement system. We can only wish that they would step up to their rightful role in supporting and promoting such governmentwide reforms rather than appearing to take their ball and go home -- leaving not much behind. That stance is petty and mean-spirited --and certainly does not reflect the vast professionalism of the Department or honor the past contributions of so many of its officials.

The Next Steps

It seems this committee and the Congress has two choices: to take the Administration's legislative proposals as the best that can be had -- or to reject them and try for better, namely the continuation of a strongly empowered OFPP and a truly unified consolidated acquisition statute.

There is no denying the difficulty of the latter course -- and the problems aren't just downtown at the other end of Pennsylvania Avenue or across the river at the Pentagon. The Congress itself is racked by jealousies over turf and authority between its committees and members no less so than DoD and OMB.

Nevertheless, it would seem that leaders of both institutions could set these motivations aside in recognition of the stark fact that the people at large have no tolerance left for partisan and bureaucratic squabbling when it's their dollars which are being put to less good use than they might be. This subject of Federal procurement reform is a microcosm: it tells much about the ability of our leaders to lead, our managers to manage, to meet Mr. Hamiliton's "true test" of good government.

I cannot help but believe that if this issue of acquisition reform is important enough -- and it is -- then Mr. Tower and Mr. Price, Mr. Weinberger and Mr. Stockman, Mr. Brooks and Mr. Roth, Mr. Nunn and Mr. Chiles and the other principals could agree to an alternative strategy along the following lines:

(1) Begin joint drafting of an acceptable "Federal Acquisition Statute" to replace the fragmented split we have today -- and emplace the modern methods we know work. Let DoD roll up it's sleeves and take a leadership role here. Recognize from the outset that the Defense Department has every right to craft that statute to accomodate it's particular needs. Even with some concessions, the net result will be of vast benefit. At the same time, let the four key committee chairs agree that congressional jurisdiction will not be allowed to get in the

way of a badly needed set of reforms. Concede the rightful role of Armed Services to preside over program particulars and Governmental Affairs only in general policy and procedures from a government-wide standpoint.

(2) Continue OFPP with strong, directive authority -- recognizing that, in the end, DoD has many avenues of superior authority to exercise both within the Executive Branch and through its committees on the Hill.

Failing some sort of agreement along these lines, it would probably be a mistake, on balance, to accept the Administration package as it stands. Important new and tested tools for competition will be relegated to a 3-year limbo status of testing. OFPP will continue to exist only as an impotent front, wasting people's time and money.

In summary, we've reached another crucial juncture in what is now a 14-year reform effort that began with the congressional Commission on Government Procurement. The directions laid out then and many changes effected since were sound, solid and have brought improvements. Today we are considering whether to take the next important step -- a unified and modern statutory framework -- but, more importantly, whether to unravel the good progress made to date with OFPP and a centrally-managed Federal Acquisition Regulation.

This is a very interesting nexus -- not just for what it will tell us about contract management but also the condition of our leadership.

Thank you very much for inviting me to attend to today. With the committee's permission, I would like to submit detailed comments on the legislative proposals to supplement the record.

WASHINGTON PERSPECTIVE

The Case For Some Defense Statesmanship or How To Hand the Democrats a Campaign Issue

by Lester Fettig

One of the more appealing perceptions of a Republican Administration — one which materially helped Mr. Reagan two Novembers ago — was the sense that these folks were simply better government managers.

Perceptions and polls alike pinned the Democrats with being not only soft-hearted (a desirable trait when times are good) but also soft-headed when it came to manipulating the levers of government operations.

Right or wrong, the consensus seemed to develop that the new Administration had a better chance to simply make the Federal trains run on time. It seemed subconsciously plausible that the business savvy that made millions for the good old boys in California might also save millions for the down-trodden taxpayers.

Now More Than Ever

White House china notwithstanding, the management economy plank remains even more crucial for this Administration, persistent as it is in having American workers swallow a thinner economic gruel and American kids fewer slices of bread. Some things are truly hard to have both ways: tight money and an expanding economy.

There is nothing wrong with the clean commitment to America's defense posture. We should breathe a sigh of relief for the clarity even if some fights remain over the magnitude. But the commitment to rearm America, the unswerving dedication to DoD's most-favored-department status, need *not* conflict with government-wide management reform.

Yet that's exactly what's been happening. Sadly, this case is not one of a head-on clash, of internal inconsistencies rooted in policy. The Defense Department juggernaut has already crashed through shaky budget bridges. Now it's started to burn down neighboring trees.

"Hey, Cap, Could I Talk To You For A Minute? Please?"

All that's happened is that the DoD is now blocking a crucial step in procurement reform, a consolidated federal acquisition statute. In the process, they are unraveling a decade's worth of reform groundwork.

The seeds of some real political problems on the Hill and in the public's mind have been planted. They can grow up as thorn bushes right up to the South Lawn. They can be transplanted with political berry patches. It all depends on some firm White House political incantation, only a slight amendment to the current chant:

"Secretary Weinberger, you still have this Administration's priority commitment to meet our defense mission needs. But while you're at it, we expect DoD to behave like part of the government-wide management team, to cooperate with government-wide economy moves, and, indeed, to take the leadership for some.

"And let's start with federal contracting."

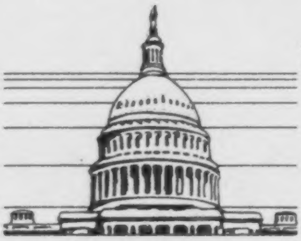
To understand the significance of DoD's latest field day in obstructing contract reform, you have to appreciate all that's gone before — and what's at stake.

Some Recent History — and Ancient Battles

The federal government spends over $110 billion a year through contracts. The saga starts right here: the Defense Department accounts for about two out of every three of those contract dollars.

Right off, you know you have some meat and potatoes for serious reform appetites. You also have the chance for some real savings.

That very notion gave rise to a separate Commission on Government Procurement (COGP) established by law in 1969, called by some the Holifield Commission (after its prime sponsor, former House Government Operations Chairman Chet Holifield of California).



Holifield was joined by a respectable bunch of Senate, House, and Presidential appointees on the Commission, including Senators Henry Jackson (D-WA) and Lawton Chiles (D-FL); Representative Frank Horton (R-NY), ranking Republican on House Government Operations; NASA legend Jim Webb; the Assistant Secretary, Dick Horner; and other private industry officials, just to name a few.

After nearly three years of labor, the 1972 COGP report called for a government-wide revamping of the contract system.

The Contract Jungle

The major thrust was to rebuild a staggering fragmentation of laws, regulations, and authorities into a coherent government-wide system. The benefit was not just for the government but, notably, for business as well. The Commission recommended:

- central high-level authority for contracting and the Office of Federal Procurement Policy (OFPP) in OMB.
- a uniform set of regulations.
- a new consolidated statute to replace the several hundred laws accreted on the books through patchwork agency amendments and authorities.

Sounds reasonable.

"Get Lost, Kid"

Being rather busy with his Watergate Committee chores, Senator Sam Ervin, then Chairman of the Government Operations Committee, passed the COGP report down to the table to the last junior member, Lawton Chiles. Ervin took a few bucks out of his wallet and told the freshman to go see what he could do with an *ad hoc* subcommittee on procurement. Lacking seniority but not drive, the Chiles subcommittee, aided and supported by Holifield and his successor in the House, Jack Brooks, compiled a rather amazing momentum.

OFPP became law.

The Commission's major systems

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WASHINGTON PERSPECTIVE

acquisition reforms were transformed into the now-governing OMB Circular A-109. The Federal Grants and Cooperative Agreements Act. The Contract Disputes Act.

Once set up, OFPP itself initiated the Federal Acquisition Regulation (FAR) project which, right now, is poised to replace over 600 sets of disparate rules and red tape with a single regulation 3 years in the making.

Take note: Scoop Jackson provided help at critical junctures. Sam Nunn contributed a continuing erudite presence on the subcommittee. Neither were strangers to defense. Chiles gained a seat on the Defense Appropriations Committee as a freshman.

Defense Statesmanship

Throughout this process, the Defense Department certainly was not overjoyed at the initiatives. They fought the OFPP, the major systems policy, the Grants Act restrictions.

But there was grudging cooperation and statesmanship displayed by DoD and OMB officials in the Nixon, Ford, and Carter Administrations. So much so that by the time OFPP undertook the massive FAR project in 1978, it was DoD which provided the core of expertise and resources. A dedicated team of forty people marched under the leadership of Air Force Colonel John Slinkard and Navy Captain Vince Pistolesci.

There was progress that everyone, including and especially DoD, could be proud of, even if compromised on some points and with residual resentment left on others. DoD and OFPP learned to work together and the OFPP Administrator even became a regular whipping boy to share the apparent sins of defense contract mismanagement.

Now We Don't Have to Bother

All that progress is now in serious jeopardy. Handed a carte blanche by the Reagan White House, facing only an OMB vacuum, the Defense Department has, in one year, materially threatened the whole reform process, muddied the waters, angered the actors, and, in the general view of some, just gone off on its own merry way when it comes to government-wide contracting reform.

The blood really hit the floor during the FY82 defense authorization process. DoD loaded the bill with a host of sensitive unilateral contracting reforms. Some were needed. Some were not. Taken together, they were a gluttonous package handled with no consideration for government-wide impact or the niceties of the collegial legislative process.

In the Senate, modest management proposals to involve OMB in oversight were crushed. In the House, Jack Brooks and Republican Frank Horton left the floor bitter and fuming after three crushing defeats.

Duberstein Dynamics

This kind of choice is a political dream. White House Congressional Affairs Chief Kenny Duberstein would swoon if he even *knew* the President *had* a choice. For you see, there *is* a "good government" clique on the Hill.

Nothing but positive potential on a point needed to cover an administration weakness. No down side, except, perhaps, minor inconveniences to the Defense acquisition process; and none there, even, if DoD would simply step up to its rightful place in leading the band instead of playing sour notes in the brass section.

Important members of Congress have invested their most precious resource — time and public posturing — to meaningful government-wide procurement reform. They are there, they are hungry, they are frustrated, they are bitter.

They happen to include the very group of medium-rare legislators whose juices flow freely and who have developed a seasoned posture: Republican John Danforth, Missouri; Lawton Chiles; Republican Bill Cohen, Maine; Democrat Carl Levin, Michigan; Republican Frank Horton, New York; Democrat Jack Brooks, Texas; Democrat Sam Nunn, Georgia.

Is Anyone Awake?

For heaven's sake, at least one of the President's advisers should wake up. They have the opportunity to serve so many multiple purposes:

- To set the example of government economy to counterbalance the pains in the private sector.
- To earn a reputation of Republicans as good managers.
- To pull off a massive government-wide overhaul for which three Presidents and a Congressional commission helped lay the groundwork — to go beyond the press hype horror stories to landmark legislation.
- To take some of the sting out of generous defense spending.
- To add a firm plank for the Republican protegees on which '82 compatriots can run with pride.
- To cash in and trade some bipartisan chits for priority Congressional contests next session.

If Cap Won't Listen, Tip Might

If none of that registers now with the Republican White House, you can bet they'll hear the echos again wherever partisans gather.

It's too good an issue and precisely the one to solve the Democrats' dilemma of how to attack defense management without attacking national defense.

If it takes such partisan pressure to unclog this log jam, then so be it. It doesn't matter, really, who does it so long as it gets done. Right now, it won't — or at least not very soon.

And if there's political fear over who will suffer credit or blame, it should be clear that there's plenty of blame ready to go around and more than enough credit to share.

The Wages of Sin

If DoD continues to enjoy its unencumbered recalcitrant stance, the Administration will pay.

The Armed Services Committees — jes' doin' what comes naturally — will pay in their growing uphill battles for defense expenditures.

OMB will continue to pay in its reputation as a Washington laughing Stockman when it comes to defense.

And the still new, potentially strong OFPP in OMB will pay either in its complete demise, or at least in having it's Level III Administrator downgraded next time to a job classification for "Gardener, weed: timid." GS-4 should be about right.

As Senator Danforth said, "Frankly, if the OFPP does not have the necessary tools to police the procurement system, then there is not much point in having an OFPP."

The OFPP badly needs some Executive Office backing to prosecute its government-wide reform responsibilities. Otherwise, most people subscribe to the notion that ineffective programs which fail to fulfill their intended purpose ought not be perpetuated.

When Jack Brooks led the charge to dilute OFPP authority during its last reauthorization cycle in 1979, the Administrator found his authority more closely throttled by and to the Director of OMB.

Presumably Mr. Brooks felt that a strong OFPP Administrator threatened his own parochial interests in

WASHINGTON

ADP and AES (Architect and Engineer Services)

But he likely never imagined the soon-to-dawn day when the OMB director himself would shrivel aside in total deference to DoD and abdicate, in all but name, his charter to make the "M" in government work.

"My Old Man Can't Lick Your Old Man"

There used to be a time when the OFPP Administrator could count on Big Daddy (the OMB Director) to beat off the bullies from DoD occasionally.

OMB Directors Roy Ash under Nixon and Jim Lynn under Ford never did want the little bastard child in their house. But Lynn did give it fair credibility thanks to the remarkable personal skills of the first OFPP Administrator, Hugh Witt, who also knew not to push very hard.

Under Carter, Bert Lance — all too briefly — had absolute clout; Jim McIntyre, occasional at best.

And now pity the poor Chief of Federal Contracting, Don Sowle. Were he to turn to Stockman or Deputy Director Harper for help in combating the views of a DoD GS-15, the likely result would be the bureaucratic equivalent of peeking over the edge of a black hole.

Some, like Danforth, have hinted that the continued existence of OFPP perpetuates a fraud at a multi-million dollar expense just to make uninitiated observers and blustering press secretaries believe that the scope of needed reform is proceeding well.

This is not the case and DoD is the key.

Some DoD Statesmanship

A little self-restraint and statesmanship now on the part of DoD could reap many rewards, not the least of which would be purely selfish and parochial. As Senator Chiles so subtlely pointed out in recent hearings, "This committee (Governmental Affairs) has four members on Armed Services and four members on Defense Appropriations.

"Those are the same eight members on whom Mr. Carlucci, Mr. Weinberger, and Dr. DeLauer are going to be calling more and more frequently for votes and favors."

Is it really so much to ask for DoD to accept a single uniform federal contracting statute if all their needs and contract tools are there and accommodated?

Is it really necessary for Carlucci to fight to banish OFPP from the Executive Office?

Of course not.

But the benefits go far beyond the Pentagon to the White House, if Mr. Weinberger can be made to think that far.

One of the most amusing examples of how far things have gotten out of control was Chiles' unconscious suggestion that maybe the President could ask the SecDef for a favor to go along with the program."

"Mr. Stockman has already told us how easily he gets rolled by Mr. Weinberger.

"We who support a uniform procurement code are just plain wasting our time unless the President himself wants a single procurement statute, unless the President says his Administration is going to spend the political chit needed with his Secretary of Defense and the military services and here in Congress, the Senate, and the House."

Danforth is now Chairman of the Federal Expenditures Subcommittee. Well respected as thoughtful and substantive, he's made no secret of his intention to follow through on the effort and his sense of priorities.

"I expect OMB and the White House to be as tough in fighting for procurement reform as they have been in the fight for tax and budget cuts."

The message is clear. Will there be an answer? **MEC**

Biographical Sketch

Lester Alan Fettig

Les Fettig is an independent consultant and author. He serves clients in the U.S. and overseas on engineering, program management and government affairs.

Mr. Fettig formerly served as Senate-confirmed Administrator of **OMB's Office of Federal Procurement Policy** and as Staff Director, U.S. **Senate Subcommittee on Federal Spending Practices**. Previously, he also held professional positions with the **Center for Naval Analyses**; congressional **Commission on Government Procurement**; **Senate Committee on Aeronautical & Space Sciences**; Rockefeller Younger Scholar at the **Brookings Institution**; and as a systems analyst and aerospace engineer with industry.

He has authored and managed numerous pieces of Federal legislation and regulation dealing with government management and contracting, including OMB Circular A-76 governing contracting out, A-109 on major systems acquisition, the Federal Grants and Cooperative Agreements Act and others signed into law by three Presidents. He has been a principal speaker and participant at symposia and special studies across the country for business, labor and government groups, the Defense Science Board, and has lectured at universities including **Michigan State, University of Minnesota, Industrial College of the Armed Forces, George Washington University, Defense Systems Management College** and **American University**. He has appeared as a witness before every major congressional committee.

In addition to government and engineering reports, Mr. Fettig has authored government affairs pieces published by the *Washington Post, Newsday, San Diego Union, Government Executive* magazine and a book on Federal contracting published by the American Institute of Certified Public Accountants. He currently serves as Washington Editor for both *Military Science & Technology* and *Military Electronics* magazines.

His awards have included Honorary Membership in the National Security Industrial Association; Honorary Professor at the Defense Systems Management College, Five Outstanding Young Men of Virginia and a national award from Engineering-News Record for serving the best interests of the American construction industry during his government tenure. He has been listed in *Who's Who in America* since 1977.

Mr. Fettig has also been active in civic and professional affairs, serving on the Board of Advisors of the **National Contract Management Association, Government Executive Publications, the Corporation for Technology Transfer**, and as President of his civic association, Chairman of a civic federation, Vice President of the Governing Board of the **Mount Vernon Center for Community Mental Health** and as a member of the **Fairfax County Community Services Board** task force on consolidating social services. He is a member of the **Greater Newington Jaycees** and a regular Little League team manager.

He holds a Bachelor of Science degree from the California Institute of Technology, a Master of Science from the University of Southern California and been admitted to Stanford University's doctoral program in Engineering-Economic Systems. Born in Brooklyn, N.Y. in 1947, Les lives with his wife, Ilka, and four children in Springfield, Virginia, where they have resided since 1969.

Statement of
Karen Hastie Williams
Crowell & Moring

Before the Subcommittee on Federal Expenditures,
Research and Rules
May 5, 1982

A Strong OFPP: The Key to Reform of Federal Procurement Policies

Mr. Chairman and Members of the Subcommittee, let me first express my deep appreciation for the opportunity to testify today on the new proposals for procurement reform. I come to this witness table not only as a former government official, but also as an active practitioner in the government contracts bar. Formulated from the perspective of both experiences, I want to share with you my thoughts on the role the Office of Federal Procurement Policy (OFPP) can and must play in efficient procurement policy reforms. In the available time, I will summarize my remarks but request that my full statement be included in the Record.

I will try not to tread over the same ground that you have just reviewed with my two predecessors at OFPP. Rather, I will focus my remarks today on the potential problems which I see emerging if OFPP fails to champion a strong leadership position in support of centralized procurement policy.

These problem areas fall into three categories -- with varying degrees of impact on the reform question: philosophical, administrative and practical. Before addressing these areas in detail, I would like to pause to discuss the procurement environment in which we find ourselves today.

The Procurement Environment

Federal procurement of goods and services is a $134 billion business -- big business, even by Fortune 500 standards. The procurement budget reaches every federal agency, employs tens of thousands of federal workers in over 18 million actions a year, and involves about one-fifth of the total federal budget.

The system through which these dollars flow from the Treasury into the private sector is very complex and is currently overloaded with layers of rules, regulations, procedures and forms, often reflecting disparate signals to potential contractors. Although the potential economic gain for government contractors is quite large, the process of contract selection, award and administration often requires significant allocations of time and such wide areas of knowledge -- procurement, finance accounting, marketing -- that many companies simply refuse to do business with the government. Their attitude can be summed up this way: "why put ourselves to the expense -- in terms of dollars and manpower -- of developing a proposal whose chances of success are, at best, unknown and probably slim. As a result, the government loses to the commercial sector many good suppliers of all sizes -- small and large. For example, Hewlett Packard, a large California-based electronics firm, refuses to sell to the government any equipment other than that which is commercially available to other customers. In the words of OFPP, "because the procurement process is cumbersome, costly and frustrating [, ... it] has discouraged competition and contributed to the erosion of the industrial base." Proposal for a Federal Procurement System (issued by OMB on February 26, 1982), at i.

Having made that statement, however, and having stated that enough studies have occurred over the past ten years, and that it is now time for fundamental change, we now are faced with legislative and management proposals that appear, I regret to say, to emasculate the current strengths of the OFPP and leave it in a debilitated state.

OFPP's Philosophical Dilemma

Mr. Chairman, there is no question that the federal procurement system needs reform. The current debate focuses on the appropriate philosophy to shape those reforms.

The main schools of thought advocate either decentralization, on the one hand, or centralization, on the other hand. Under the decentralization scenario, a procurement executive in each agency sets standards for the internal process and generally oversees the policy operation of that system, tailoring policy directives to agency missions. Procurement authority itself is still vested in the agency head and delegated through the agency's operating channels. The Department of Defense in particular retains a significant degree of procurement policy autonomy.

OFPP thus sits in a "coordinating" position, devoid of substantive authority to push forward the policy directives it issues. Relying on a coordination role alone would appear to leave OFPP extremely vulnerable to hard line, recalcitrance on the part of one or more agencies and create immovable roadblocks to meaningful reform efforts. This decentralized approach is reflected in both the February and April management and legislative proposals submitted to the Congress by OMB. It is ironic that this communication was signed by the Deputy Director of OMB, rather than the Administrator of OFPP.

A centralized management approach would invest OFPP with strong management and regulatory authority to support its policy role. In developing policy directives, it would consult with the agencies and the public to develop a broad spectrum of views. Once issued, a policy directive would be implemented authoritatively with management and regulatory follow-through.

Let me be clear. I do not believe that a centralized policy approach requires encroachment into agency operations. Indeed, OFPP should not be trying to run the day-to-day operations or to establish contractor selection criteria for the Defense Mapping Agency or Agriculture's Forest Service, for example.

But, with the authority to "resolve" rather than "facilitate resolution" of conflicting views among the agencies about a proposed regulatory change, OFPP would be able to establish a regulation to guide both agencies in establishing, let's say, a priority for commercial product buys. These are just a few of the areas in which this fundamental difference in approach is manifested.

In sum, a threshold decision for this Committee would appear to be which approach, or which combination of approaches, is best for the country and best for progress in procurement reform.

OFPP's Administrative Dilemma

Turning from questions of philosophy to questions of management and administration, the OFPP proposals would reduce the Office to little more than a housekeeping function. This view is supported by several features of the proposals. First, no statutory authorization level is proposed in the legislative package. Presumably, "such funds as are necessary" will be authorized and appropriated. But who sets the dollar level?

Under current law, OMB would set the level since funds for OFPP are now provided within the OMB general government appropriations bill. An independent OFPP administrator certainly stands a better chance of successfully defending efforts to cut back on budgetary levels, armed with a statutory authorization level, than does an administrator left to the largesse of an OMB director -- who may or may not appreciate the importance of procurement policy issues.

Additionally, in spite of statements to the contrary about the issues being over-studied, a 30-month testing period is proposed. The introduction of this testing period suggests that the current Administration has concluded that more studying must precede any fundamental change in the procurement system.

Finally, there is no guarantee that any agency actually will follow-up with the testing of competition, concepts, commercial practices or the raising of applicable thresholds advocated in the OFPP legislative proposal. As a result, there is little incentive for agencies to take this proposal seriously. Indeed, they may not have to change their current procurement practices in the slightest.

When will we make an end and move forward with procurement reform? When will we support a good, strong A-76 policy on contracting out? When will we move to develop realistic size standards for small businesses that reflect actual business practices in industry? No clear answer appears to be emerging.

OFPP's Practical Dilemma

From a practical standpoint, OFPP now faces an uphill battle to achieve procurement reforms. Divided views exist everywhere. Industry is divided on its position on the new proposals. The agencies are also divided in their support for or opposition to the proposals.

Members of the Bar have voiced grave concern about where the new "competition" will lead us. Will we indeed get more competition or will we reduce competition in the government marketplace and get the two-favorite-vendor, "old boy" network back with a vengeance?

In a recent Federal Bar Journal, my colleague, Dale Oliver, has analyzed this question and reached some enlightening conclusions which are worthy of the Committee's consideration. See D. Oliver, "A Critical Analysis of OFPP's Proposal for a Uniform Federal Procurement System: Reducing Competition in the Government Marketplace," Federal Bar News & Journal, March, 1982. I ask that the full text of the article be included at the end of my statement.

Conclusion

If there ever was a time when OFPP should take the reins of procurement policy power, it should be now, at a time when OMB's star has soared and budgetary considerations are so key to all major policy and regulatory issues. As an arm of OMB, OFPP should be in a posture to benefit from the glow emanating from the OMB star.

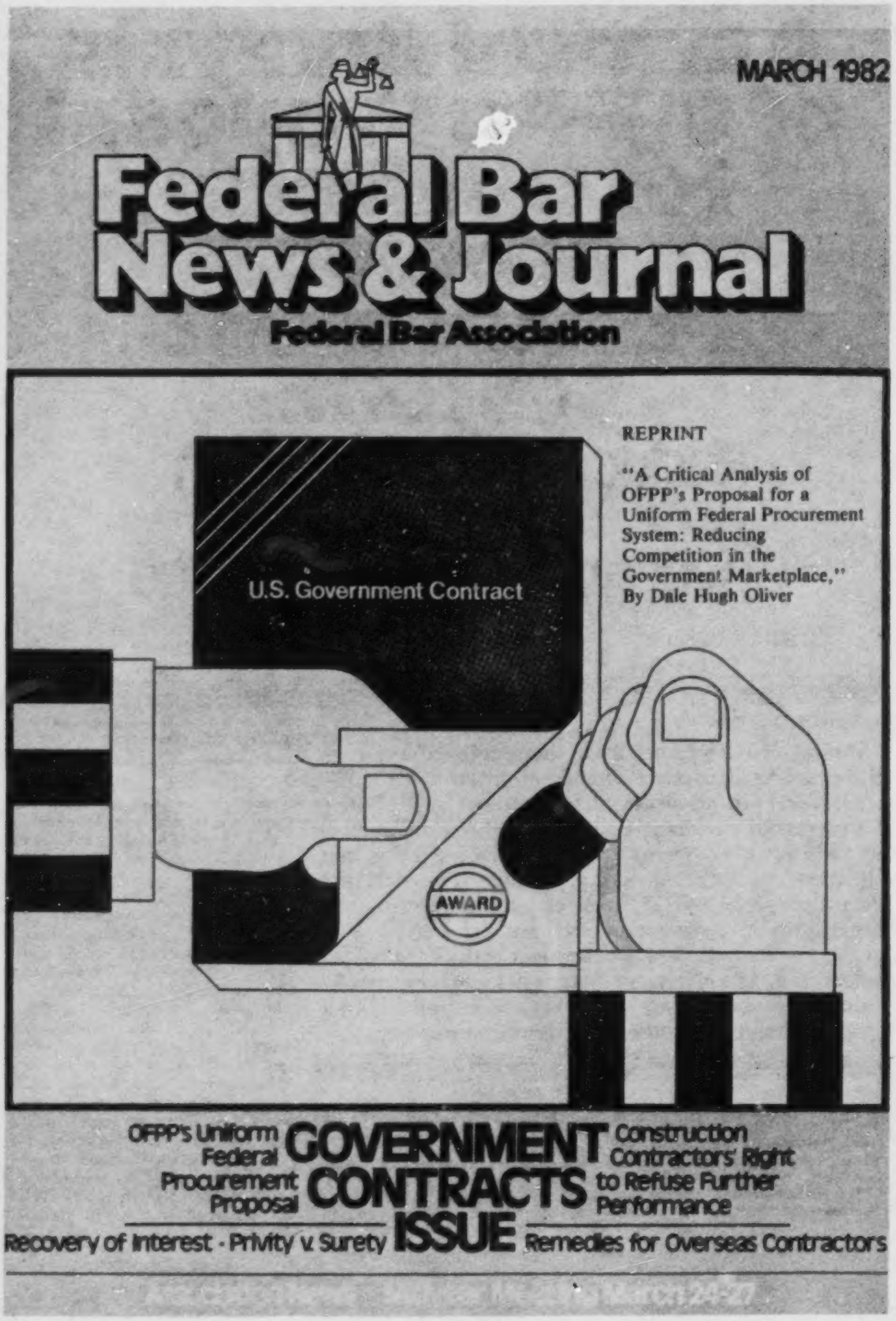
It is in the interest of all procurement professionals that OFPP take a more activist role. OFPP was established in 1974 as a catalyst for change. It can either shape the future or be shaped by it.

As the debate continues over the next several months and Congressional Committees carefully scrutinize the new proposals, I would hope that OFPP uses the time wisely to address some of the substantive policy issues of major import today. Several existing policies that are already in place are being eroded by piecemeal legislative and administrative action. For example, the contracting-out policy set out in OMB Circular No. A-76 and ratified by a recent Executive Order, is under seige in the House of Representatives. The Senate has taken a much more supportive role. It is the duty of OFPP to work with the Members to educate congressmen about policy issues and respond to their concerns. The active support of OFPP is a necessary compliment to private sector initiatives in this area. Such an opportunity for OFPP to bring together private and public sector concerns in support of government policy should occur on a regular basis.

Additionally, the professional procurement community, in the public and private sectors alike, is outraged by the heavy-handed methods used by the Inspectors General and audit teams to challenge contractors' operations and to second-guess the decisions of contracting officers. This is not a healthy situation and does little to promote industry/government cooperation and to lessen adversarial relationships. In the same vein, there is widespread concern that the administrative and legislative push for government-wide debarment in the absence of appropriate due process protections and opportunities for reciprocal government-wide exoneration will lead to an even greater erosion of the industrial base and flight of suppliers/contractors from the government arena.

OFPP stands at a crossroad in its history. The Congress has the opportunity to champion independent, centralized policy development as the keystone for procurement reform. I believe that a strong OFPP is pivotal to such a development and that only with a strong OFPP to balance the interests of the public and private contracting community can we hope to improve and streamline the federal procurement process.

Thank you, Mr. Chairman. I will be happy to respond to whatever questions the Committee may have.



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REPRINT

"A Critical Analysis of OFPP's Proposal for a Uniform Federal Procurement System: Reducing Competition in the Government Marketplace," By Dale Hugh Oliver

GOVERNMENT CONTRACTS ISSUE

OFPP's Uniform Federal Procurement Proposal

Construction Contractors' Right to Refuse Further Performance

Recovery of Interest · Privity v. Surety

Remedies for Overseas Contractors

[illegible] March 24-27

A Critical Analysis of OFPP's Proposal for a Uniform Federal Procurement System:

Reducing Competition in the Government Marketplace

BY DALE HUGH OLIVER

I. INTRODUCTION

Although paying lip service to the benefits of a competitive procurement system, the recent proposal for a uniform federal procurement system proffered by the Office of Federal Procurement Policy[1] undertakes to restructure radically the Government marketplace in a way that will most certainly reduce competition. The statutory scheme proposed by OFPP de-emphasizes the importance of price in Government purchasing and invests vast amounts of discretion in procurement officials to curtail competition. The effects on American industry generally could well be an increase in market concentration and a corresponding reduction in an overall competition.

I. INTRODUCTION

The OFPP legislative scheme proceeds on the professed assumption that Government contracting should be similar in practice to that enjoyed by commercial companies. There are four problems with OFPP's use of this assumption. First, the Government, because it is the Government, is perceived by its citizens as different than a commercial company. A citizen demands a duty of the Government to treat participants in the marketplace with greater evenhandedness and fair play than that same citizen would demand or otherwise expect from a commercial company. Second, the Government is truly different as a buyer—both because of the size of its purchasing power and because of the number of conditions that are exacted from sellers. These conditions have no counterparts in the commercial marketplace. For example, the ability to obtain [illegible]st and pricing data pursuant

Editors' Note:

The author and the editors understand that the Office of Federal Procurement Policy expects to issue another proposal that may address some of the concerns cited by the author. It may be issued by the time of this publication. The following analysis is based upon the most current version of the OFPP proposals available at the time this article was prepared late in February 1982.

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to the Truth in Negotiations Act results in tremendous economic power for the Government at the bargaining table. Third, the Government—because it is not a profit-maximizing institution—cannot be viewed as truly concerned with minimizing prices. Greater control over purchasing decisions, therefore, may be required. And fourth, the assumptions of how commercial concerns act in the marketplace, as discussed below, are misperceived by the OFPP and thus incorrectly applied.

The thesis of this article is that the present version of the proposed legislation presented by OFPP is not in the best interests of this country's economic system. This article will examine the departures of the proposed legislation from current statutory constraints and analyze those departures in terms of general principles of economic price theory. The conclusions reached are that the proposed legislation will act to reduce competition by creating oligopolies and will over the long run increase prices paid by the Government.

II. BACKGROUND OF THE PROPOSED LEGISLATION

The operation of a sunset provision contained in the legislation[1] originally creating the Office of the Federal Procurement Policy caused Congress to review the functions, effectiveness, and operations of the OFPP during its first five years of existence. That review led to the passage of the Office of Federal Procurement Policy Act Amendements of 1979.[2] Part of that legislation required that the administrator of OFPP submit to Congress within two years a proposal for a uniform procurement system and the legislative changes required to implement that procurement system. The Act amendments specifically contemplated that the administrator could recommend a consolidated statutory basis for procurement. Interestingly, one of the other changes brought about by the OFPP Act amendments was the articulation of a new objective for OFPP. That new objective declares that one policy of Congress is to promote "the use of full and open competition in the procurement of products and services...."[4] The current proposal for a uniform federal procurement system is the product of the 1979 OFPP amendments.

III. ANALYSIS OF THE CHANGES RELATING TO CONTRACT NEGOTIATIONS AND COMPETITION.

Section 101 of the proposed legislation is a section entitled "Competition."[5] Section 102, a section entitled "Evaluation of Bids," provides for changes in the manner that the Government solicits and negotiates contract awards.[6] The changes expressed in these two sections, and an analysis of the likely effects on competition generally, will be discussed in turn in this section. This analysis will also consider the comments offered by OFPP in connection with its submission of the proposed legislation. Indeed, it is only upon review of these comments that the full meaning and breadth of the proposed legislation can be understood.

A. Removing the Requirement to Maximize Competition

Section 101.(a) states "[e]xecutive agencies shall solicit bids from a sufficient number of prospective sources to insure that the Government's needs for property or services are obtained through effective and efficient competition." The section goes on to define what constitutes "effective and efficient competition." That condition is satisfied, according to Section 101.(a)(2), when at least two bidders respond to the solicitation. Although the legislation refers to efficient competition—a concept which is itself curious—the number of offerors to satisfy this condition is therefore posited as being as few as two.

The current statutes applicable at least to procurement by the military agencies and by the National Aeronautics and Space Administration provide that "proposals shall be solicited from the maximum number of qualified sources..."[7] The regulations applicable to civilian agencies adopt this requirement to maximize competition in Government procurements.[8] The concern of the sponsors for the present statutory provisions clearly was that real competition must be achieved by the Government in purchasing its goods and services.[9]

If the intention of OFPP to reduce the potential number of offerors was not already clear from a comparison of the present statutes with that being proposed, the comments accompanying the proposed statute do announce specifically this intended result. The OFPP finds that the Government is presently suffering from having too many offerors: "Still another problem with full and free competition is that the Contracting Officer has little or no control over the number of prospective bidders who may respond to a given requirement."[10] The concern expressed by OFFPP in this connection is that the Government, in any given procurement, may end up spending more money processing the number of offers received than the value of the contract itself.[11] Although the OFPP comments contemplate that the Government will seek "adequate" competition for the particular types of goods and services being called for in the solicitation, the statute itself permits the contracting officer to look to no more than two offerors in order to find that competition exists. Whether this is a valid definition will be analyzed below.

Even the expression that at least two offerors are required may be qualified in the proposed legislation, however. In a curious provision set forth in Section 101.(a)(4), the draft legislation says that effective and efficient competition will be achieved when there is "an expectation of greater benefits flowing from the competition than the combined executive agency and private sector costs of conducting the competition." This provision may mean that the contracting agency is excused even from the obligation of seeking to secure at least two offerors in the event that the agency judges that the governmental costs of undertaking a competitive procurement outweigh the perceived benefits.

The manner in which the Government would conduct this analysis is not covered in the comments and is conceptually troubling. The General Accounting Office has said that the benefits of competition can only be judged upon its realization—that is, a contracting agency is not free to avoid competition by speculating that the savings realized will be insubstantial.

Also of concern is that this possible relaxation of the obligation to solicit at least two offerors appears to violate a later section, Section 101.(b), of the proposed legislation which enumerates exceptions for "noncompetitive procedures." None of the five exceptions grant the type of discretion to the agencies which would be permitted by the provision at Section 101.(a)(4) wherein an agency could perhaps eliminate competition based upon a hypothetical projection of internal and external costs related to conducting the competition.

B. Limiting the Nature and Extent of Negotiations.

The radical change contemplated by OFPP in the conduct of negotiations by the Government is not specifically recognized in the legislation itself. Section 102.(c) states only that "[b]ids shall be evaluated with discussions whenever it is necessary to discuss the Government's requirements or the terms and conditions of the contract with bidders after receipt of bids but prior to award of the contract." Rather, one must turn to the accompanying comments to understand OFPP's new direction.

The comments describe three "new types of competition." The third of these three types is described as "multiple factors" competition. This category of procurement most closely aligns with the present use of negotiated procurements. The comments state that:[11]

> This type of competition considers the quantitative and qualitative value of the property or service to the Government. Procedures and evaluation factors for such competition will be tailored to the objectives, dollar value, complexity, and risk.[12]

The most significant difference between this type of competition and the other two types—labeled "price" competition and "lowest total cost" competition—is that the third category permits awards on other than cost or price alone. The comments provide that the multiple factors competition is "all inclusive,"[13] It can be used when the "Government's needs cannot be clearly defined;" when "[t]here is no defined solution to Government needs;" when "[e]valuation factors for award cannot be objectively measured;" or when "[t]echnical or management performance is critical."[14] Predictably, just as is true with negotiated procurement presently, this last category of competition will involve the greatest portion of procurement dollars. This category of procurement is intended to afford to the procurement agencies the greatest flexibility in conducting the procurements and in selecting a contractor.

The contemplated differences between this new type of negotiated procurement and that which is presently employed are significant. The OFPP states in its comments that the Government, under the new procedure, can decide to limit discussions to only one of several of the competing offerors:[15]

> Discussions may be conducted with one or more of the bidders when it is in the best interest of the Government. These discussions may range from clarification of bids to substantive technical, management, or cost factors.

This provision in the proposed system presumably will be implemented by regulation since OFPP has not chosen to note the possibility for selective and limited discussions in the draft statute itself.

This possibility for limited and selective discussions goes beyond the flexibility afforded to agencies under the present regulatory scheme. Current regulations generally applicable to civilian and military agencies provide that meaningful negotiations must be conducted with all offerors within the competitive range. The legislative history for the requirement in 10 U.S.C. §2304(g) to the effect that competition be maximized clearly provides that the negotiations be uniform:[16]

> It is our opinion that the authority to negotiate does not, of itself, warrant the curtailment of competition. Yet this may be the result where several proposals are received and the contracting officer decides to negotiate with only one offeror or to award a contract without discussion with any offeror....We believe that....negotiations [should be conducted] with all responsible offerors who submit proposals within a competitive range, price and other factors considered.

The General Accounting Office, in construing this statutory provision and the implementing regulations, had earlier concluded that in conducting meaningful negotiations a procuring agency was required to notify all offerors within the competitive range of identified deficiencies in their proposals and then give an opportunity to those offerors to submit a revised proposal. The General Accounting Office was, and generally is, equally clear that all offerors have to be treated in an evenhanded fashion and that one offeror could not negotiate exclusively with the Government without a similar opportunity being provided to other offerors. For example, the Government is generally not free to negotiate with one offeror after the close of best and finals without the agency reopening negotiations with all offerors within the competitive range and providing all an additional opportunity to submit a best and final offer.

A limited exception to this requirement for conducting meaningful negotiations developed in connection with certain NASA procurements. That agency developed a procedure[17] in which offerors were permitted opportunities to clarify proposals but deficiencies were not identified during the course of discussions. As a result of the submission of technical and price proposals, and any clarifications, NASA then would select one offeror with which negotiations were conducted to definitize the contract. Any challenges to this procedure as being violative of the statutory provision to conduct meaningful negotiations were rebuffed by the General Accounting Office.[18] This procedure is only employed by NASA in certain procurements.

The military departments, as a result of the success of NASA in withstanding challenges at the General Accounting Office, have adopted a "four-step procurement" approach which permits the military agencies much of the flexibility enjoyed by NASA. The first step calls for the evaluation and clarification of technical proposals submitted by the offerors. The second step involves evaluation and clarification of cost and price proposals. During the second step, offerors are advised of areas in their proposal for which clarification is required. The agency does not point out deficiencies or conduct "meaningful discussions" relating to the proposal. Further clarification of the technical proposals is elicited and a competitive range is established. The third step involves submission of final technical and cost proposals and the selection of a successful offeror by the Government. The fourth step then involves the negotiation of a definitized contract. Again, these procedures are applied only in a limited set of procurements.[19]

The OFPP draft legislation, at least as it is contemplated in the comments, embraces the four-step procedure but goes an additional step and releases the procuring agencies from the requirement of equal treatment during the individual steps of the negotiation process. The Government, under the proposal, could elect to conduct discussions with only one of the offerors at the same time it is seeking minimal clarifications from others.

The principal difference between this procedure and that currently in place under the four-step concept is that the individual offerors would not know who had been selected for award during the course of these negotiations. Unlike the four-step procedures where the negotiations only take place after selection, all offerors having submitted a proposal would be in the running for selection—at least in theory. The agency, however would be free to select a target company for award and then negotiate a contract with that company—still having the benefits of the appearance of competition to enhance the leverage available to the Government in negotiating terms and conditions with the intended offeror.

Other offerors, not designated as targets for award, would be kept in the competition to give a competitive appearance. Any realistic opportunity for these companies to be selected would be prejudiced, of course, by the failure of the Government to conduct other than pro forma discussions with them. Indeed, as is discussed below, the scheme proposed by OFPP even does away with the opportunity of these about-to-be-disappointed offerors to submit best and final offers: "If price competition exists, Government officials will not ask for or otherwise suggest a price reduction (*e.g.*, 'best and final offers') from prospective contractors unless there is a material change in scope of work or terms and conditions."[20]

Presumably, therefore, under the proposed scheme, the Government would be accorded almost complete discretion in deciding with whom and to what extent negotiations and discussions would be conducted. This opportunity would be extended beyond the present limited circumstances to which the four-step procurement approach is applied and would embrace almost all circumstances in which negotiated procurements are now conducted.

C. Removing the Concern for the Lowest Price and Getting Rid of the Best and Final Offer

The OFPP comments reflect a fundamental change in emphasis for the objectives of the Government in purchasing goods and services. The comments repeatedly point to the need to secure a "reasonable" price rather than the lowest evaluated price. For example, the OFPP states, "[t]o be effective, competition must be adequate to ensure that the Government acquires goods and services it needs at reasonable prices, and competition must be efficiently conducted."[21]

Institutional reasons may exist why a Government agency would prefer not to obtain the lowest price. One reason could be the difficulty of administering a contract in which the contractor is trying "to get well" from a proposed cost that was at margin. Whether this objective is valid can be questioned and is discussed below.

The OFPP, reflective of its indifference to obtaining the lowest price as opposed to obtaining a "reasonable" price, proposes in its comments to eliminate its present practice of establishing a common cut-off to negotiations by utilizing the mechanism of best and final offers. The practice of best and final offers is a device used by agencies to secure one last round of price reductions. A common opportunity is given to all offerors at the close of negotiations to submit a revised price and technical proposal. This best and final offer is then evaluated by the agency in selecting a contractor for award. With the exception available to the military department and NASA under the limited circumstances discussed above, this best and final offer precludes further negotiations except to the extent that the agency is willing to reopen negotiations with all offerors.

Typically companies will substantially reduce price proposals in the best and final offer. Dramatic examples in the recent past abound. In one celebrated case, the best and final offer reduced the prior price proposed by 50 percent.[22] The contractor, upon challenge at the General Accounting Office, maintained that this price reduction reflected a management decision to absorb some of the contract costs.

The Government agencies have long chafed at the increased administrative burdens that a requirement for a best and final offer imposes. Oftentimes the end of negotiations encroaches upon the deadline for commitment of funds and therefore real time presures exist in making the award decision. The agencies dislike the inconvenience of having to conduct a further significant review of the proposal late in the procurement in order to evaluate the technical significance of major price reductions. This last-minute evaluation, made significant by significant price reductions in the best and final proposal, substantially increases the workload on the agenicies at the tail end of the procurement. Administrative convenience is probably, therefore, the reason for the direction taken in the OFPP comments.

The OFPP constraint against soliciting best and final price proposals appears to extend throughout the solicitation period and prohibits generally seeking revised price proposals once initial price proposals have been submitted by the offerors: "If price competition exists, Government officials will not ask for or otherwise suggest a price reduction (*e.g.*, best and final offers') from prospective contractors unless there is a material change in scope of work or terms and conditions."[22] This statement suggests that the negotiations taking place after receipt of initial price and technical proposals will be limited to technical aspects; even though the negotiations bear on price, there is to be no further revision to price unless those changes can be said to be supported by a material change in scope of work.

A contractor, in the face of this lack of opportunity to revise price, presumably will have to price into the initial price proposal a certain contingency factor to cover technological growth to the proposal occurring during the negotiations. All this will likely increase prices to the Government.

The OFPP abandonment of the concept of best and finals is at odds with practices in the commercial marketplace. (Note that parallelism with that commercial marketplace is one of the professed goals of OFPP in suggesting the draft legislation.) Commercial companies regularly engage in last round price reduction negotiations with suppliers in order to arrive at the lowest possible price. Pricing by an offeror during the solicitation of a Government contract regularly includes as a matter of course a downward adjustment factor, perhaps approaching 15 to 20 percent of the bid price, which the prime contractor assumes can be exacted from suppliers upon award. This practice, of course, really extends the concept of best and finals comcercially rather than limiting its application as the OFPP now seeks to do.

IV. AN ECONOMIC ASSESSMENT OF THE PROPOSED OFPP CHANGES

This section will examine the economic implications of the changes suggested, either directly in the proposed legislation or indirectly in the comments, by the OFPP in connection with this uniform procurement proposal. The conclusion is that concentration in economic markets probably will be increased as a result of the changes proposed by OFPP. Certainly that result is suggested by applying traditional concepts of economic price behavior. A further logical conclusion from this analysis is that the Government will end up spending more money as a result of the changes suggested by OFPP. These conclusions are not empirically based but rather draw upon inferences supported by traditional economic theory. In addition, this analysis will address some historical notions of fairness and evenhandedness which, from a policy viewpoint, may also be used to judge the suitability of the changes being proposed by OFPP.

There is reason for great concern if the conclusion is valid that the changes by OFPP will decrease competition and increase concentration within the Government marketplace. A recent study prepared for the Federal Trade Commission analyzes two Government markets: the electronic and the helicopter industries.[23] The study notes the possibility that a lack of competition in these markets has spilled over and has resulted in increased concentration in the commerical markets for these same items. Therefore, the possibility that the OFPP changes will decrease competition must be carefully examined.

A. OFPP's Creation of Oligopolies

The OFPP, in the draft legislation, seeks to define competition as that situation in which at least two offerors respond to the Government's solicitation. This definition, however, is at odds with economic theory and likely will reduce the amount of competition characteristic of the Government contract marketplace. As discussed above, the present statutory command is that there be full and free competition; that is, responses are invited from all offerors seeking to compete in the selection process. Agencies are presently unable artificially to constrain the number of offerors.

An oligopoly is a market situation in which a few firms compete. These sellers, because of the limited number of participants, must take account of one another in their competition:[24]

> Market situations in which there are few enough sellers of a particular product for the activities of one to be of importance to the others are oligopoly situations. A single seller occupies a position of sufficient importance in the product market for changes in his market activities to have repercussions on the others. Other sellers react to the market activities of the one and their reactions in turn have repercussions on him. The individual seller is aware of this

> and in charging his price, output, sales promotional activity, or quality of his product he must take the reactions of others into account.

A true oligopoly situation is characterized in the long run by barriers to entry. The OFPP's action of defining competition for contracting officers as being satisfied with only two offerors helps create an entry barrier for any particular procurement. Indeed, the entry barrier is a perfect one. The contracting officer, when satisfied that the condition of two offerors will be met, can limit the participation of other offerors upon the OFPP's announced rationale that "too much" competition results in excessive spending by the Government in processing the various proposals. Fewer competitors are also administratively perceived as easier to handle.

The announced rationale by OFPP that the costs of competition are excessive certainly calls into question the studies utilized by OFPP in reaching this conclusion. The comments to the OFPP draft proposal do not provide elucidation as to the data sources upon which the OFPP drew these conclusions. The savings would have to be substantial in order to justify a diminishment of competition. One recent study found that competitive procurements result in savings to the Government of between 15 to 25 percent.[25] The speculative costs which the OFPP projects as incurred in processing "excessive" proposals has to be measured against this potential savings from competition.

Furthering oligopolistic markets generally portends four adverse consequences. *First*, an oligopoly will result in higher prices:[24]

> In oligopolistic industries demand curves faced by individual firms slope downward to the right, or are less than perfectly elastic. This much seems certain, whether or not individual firm demand curves can be located with accuracy. Consequently, marginal revenue for individual firms will be less than price. An individual firm, attempting to maximize profits or minimize losses, seeks the output at which marginal cost equals marginal revenue. Since the purely competitive firm maximizes profit at the output at which marginal cost equals price (and marginal revenue), the oligopolistic firm by comparison restricts output and charges a higher price.
>
> Since entry into an oligopolistic industry may be partially or completely blocked, prices may exceed average costs and profits may exist in the long run. To the extent that profits occur, consumers pay more for products than is necessary to hold the resources making them in the industries concerned.[26]

Second, the automatic tendencies for firms to realize maximum efficiency in a competitive market are reduced in the long run under an oligopoly. *Third*, sales promotional activity is increased generally in an oligopoly as firms seek to expand market share without price competition. This fact may lead to uneconomic use of resources since sales promotional activity does nothing to increase the actual utility of the particular resources being purchased. And *fourth*, collusive behavior is encouraged in an oligopolistic situation as the individual firms—being few in number—are able to anticipate and predict the behavior of each other.

In sum, the OFPP's elimination of "full and free competition"—an elimination which interestingly is described as inviting criticism from Congress[27]—can be predicted to have drastic effects in the Government marketplace. The presumptions which can be applied, absent compelling economic data to the contrary, are that prices will be generally increased to the Government and that the resources allocated to this marketplace will be unnecessarily increased. Furthermore, an oligopolistic market, which by definition is being created under the OFPP's definition of competition as being only two offerors, invites what the Government must perceive as deviant behavior on the part of participants. That is, an oligopolistic market is generally characterized by greater sales promotion activities and by the tendency towards collusive behavior.

In sum, it is not true that competition is maximized with only two offerors. This definition, lightly articulated by OFPP in the draft legislation, bears serious scrutiny. The potential dangers are substantial.

B. The OFPP's De-emphasis of Price Competition

The OFPP's repeated use of the term "reasonable price," as opposed to lowest price or lowest evaluated price, and the specific insistence that the Government not seek more than the submission of one price proposal (in the absence of compelling changes to the procurement) must be read as a movement away from securing goods and services at the lowest price. The OFPP says that it is reflecting a concern that the Government agencies be free to operate as commercial concerns. However, this proposal to diminish price competition by deleting the best and final offer is directly at odds with commercial experience.

Furthermore, it is a reasonable argument that Government agencies should operate under even stricter mandates to seek lower prices than commercial concerns. A Government agency after all is not ultimately an economic entity and performance is not judged by profits. The efficient allocation of resources therefore must be insured at the onset of the acquisition rather than awaiting assessment of the results. A contracting officer has no profit bottom line by which to judge the effectiveness of his particular decisions.

The OFPP, as a consequence of this fundamental difference between Government agencies and commercial concerns, should increase rather than decrease the awareness within agencies as to the need to allocate resources efficiently. This efficient allocation of resources, viewed from a societal perspective, must be measured in lowest price.

That is not to say, however, that the lowest evaluated price cannot reflect differences in products which have economic benefit for the Government. Indeed, such differences can be built into the selection rationale as part of the decision of what constitutes the most advantageous proposal for the Government. However, the price of that product is an important attribute which society expects Government agencies to regard in making the selection decision. The OFPP's proposal to reduce price competition is at odds with this societal expectation.

A de-emphasis of price competition necessarily will mean, in applying economic theory, that too many resources will be drawn to the Government economic sector. This general misallocation of resources also is at odds with how a competitive market system would desire to spend its purchasing dollars.

Certainly, as discussed above, there is administrative inconvenience in having to deal with "best and final offers." However, serving administrative convenience by reducing competition is contrary to both commercial practice (a goal which OFPP seeks to embrace) and the society's expectation that the Government will seek to use its allocated resources most efficiently. OFPP, contrary to its approach suggested in the comments, should be seeking to increase price competition rather than reflect its de-emphasis.

C. OFPP's Elimination of Equal Negotiation Opportunities

The OFPP, in its comments but not in the draft legislation, has articulated that an agency should be free to conduct "meaningful discussions" with only one of the offerors. The difference between this approach and that discussed above in connection with the four-step military approach or the specialized procurement utilized by NASA is that in those two types of procurement the negotiations are conducted with a selected offeror. That is, the offeror is on notice that the Government intends to award a contract to that entity and the negotiations are conducted in light of that knowledge. This results most probably in a situation as to a particular procurement where a monopsonist is facing a monopolist. The single governmental buyer is having to negotiate with the single seller at this point in the procurement and the result in terms of price or negotiating advantage is indeterminate. Economic analysis cannot successfully predict what will result when a monopsonist sits across the table from a monopolist. Rather, the ultimate terms and conditions will depend on the particular needs and bargaining abilities of each.

The OFPP proposal would ease the Government's negotiating problems of sitting across the table from a monopsonist. The OFPP comments contemplate that the Government can conduct negotiations with a single offeror without informing that offeror that the Government intends to contract with it. Other competitors will be kept in the competition for appearances sake so that the intended awardee still believes that it faces competition.

This proposal by OFPP does a great deal for Government agencies. First, it gives those agencies increased bargaining power in negotiating with contractors still afraid that they may not be selected for award. Second, the agency need not go through anything but pro forma negotiations with all other offerors and yet secure the benefits of the appearance of competition. This scheme will undoubtedly give increased leverage to the Government to exact at least better technical terms and conditions than could otherwise be expected. Probably this increased leverage will not result in better prices for the reasons suggested above (i.e., the deletion or elimination of best and final offers and a general de-emphasis for price competition).

This OFPP approach to negotiated procurements, while increasing the Government's ability to negotiate more advantageous contracts, invites criticism in terms of basic fairness. The approach necessarily means that offerors will be deluded into continuing participation in a procurement without any real possibility of selection for award. The Government, free under the OFPP's scheme not to announce its intended awardee and free to conduct meaningful negotiations with only that awardee, allows the continued "participation" of other offerors.

At least under the present four-step procedure, other offerors are notified that meaningful negotiations are to be conducted with only one offeror and therefore are not invited to expend additional resources in pursuing the competition. This assessment could not be made, however, under the approach now suggested by OFPP. Rather, competitors—never certain whether any one of their number was participating in more meaningful negotiations with the Government—would be led onto continued participation without any real opportunity for award. This approach seems basically unfair and at odds with the notion that the Government has an implied contract with a competitor to consider its offer fairly.

Concepts of fairness need not necessarily enter into considerations by a commerical concern in seeking to maximize its resources. However, this fact should not be true for the Government. Its citizens expect fair treatment and evehanded consideration. Contrary treatment is a fundamental flaw in the scheme set forth by OFPP in its comments to the draft proposal.

D. The OFPP's Efforts at Increasing Competition

The OFPP, in the draft statute and its comments, posits basically three different efforts at increasing competition within the Government marketplace. First, OFPP articulates a desire for Government agencies to use and seek commercially available products rather than specifically tailored products for the Government. Second, the OFPP confines sole-source procurements to five specific situations. And, third, the OFPP urges the creation of "competition advocates" within each agency for the purpose of increasing the agency's awareness of competitive opportunities. These suggestions, seemingly suggestive of a planned economy rather than one characterized by the workings of "free and full competition," probably will be ineffective.

The OFPP itself notes in its draft comments that the GAO has recently concluded that the military and civilian agencies have missed a number of opportunities to conduct competitive procurements.[38] The reasons cited by the GAO for these missed opportunities are the lack of awareness of competitive alternatives and the reflection of bias in favor of a particular producer either as a result of requests by the end-user or as a result of expressions from high-ranking officials. These circumstances would not be avoided under the first two alternatives suggested by the OFPP. The contracting officer still will have substantial discretion to find that the agency needs particularized products rather than those commercially available.

Also, the contracting officer has available in order to justify sole-source negotiations two rather broad-sweeping exceptions. Specifically, the contracting officer can proceed with a sole-source procurement upon the perception that the property or service is available from only one source or in the event that the urgency for the requirement is judged to preclude competition.[39]

As long as the contracting officer is granted substantial discretion in assessing whether or not goods or services are competitively available, the reasons cited by GAO for sole-source procurements in instances where competition could be had will probably not be reduced. The OFPP statute cannot guarantee that these abuses will be corrected under the proposed statute. This conclusion is particularly valid because OFPP has given further discretion to the contracting officer to select only two offerors to compete. The proposed statute, thus, can be viewed as an ineffectual effort to restrain the anticompetitive abuses of procuring agencies at the same time that substantially more discretion is being given to those agencies to reduce competition generally.

The OFPP's third alternative of recommending the creation of competition advocates also seems reflective of a planned economy. The OFPP's draft legislation reduces the workings of the marketplace by eliminating full and free competition and then creates an additional bureaucratic institution to achieve the results which otherwise would be expected from a competitive market.

Presumably the competition advocate would operate in somewhat the same fashion as the small business representatives now located within the agencies. It has been suggested, however, that the small-business advocates have not been particularly successful in changing the allocation of business between large and small concerns. Indeed, the percentage of Government procurement allocated to small business has remained roughly the same over time. Whether the competition advocates can be made effective, however, does not reduce the basic concern that they will not be as effective as would be the workings of full and free competition—a condition which OFPP in the draft legislation has sought to eliminate.

The best thing that can be said for the three proposed suggestions for encouraging competition is that they might further competition. This result is not guaranteed, however.

The absence of supporting data and economic analysis by OFPP calls into question whether or not adequate consideration has been given to the effects of the proposed statute on competition generally. The removal of full and free competition should give serious concern as to the suitability of the legislation in satisfying that new directive of Congress promulgated in the OFPP Act Amendments of 1979: "The use of full and open competition in the procurement of products and services...."

IV. CONCLUSION

The OFPP draft statute for a uniform procurement system and the accompanying comments contemplate three fundamental changes in the way the Government currently under statute undertakes negotiations. First, the Government would no longer need to seek "full and free competition" but could instead limit competition to but two offerors. This change is perceived herein to further the possibilities of oligopolistic markets, thereby inviting the host of adverse economic consequences which result. Predictably, the Government will in the long run end up paying greater prices for goods and services than under markets characterized by "full and free competition."

Second, the OFPP's comments envision a reduction of price competition through the elimination of best and final proposals. This elimination is at odds with commercial practice and also leads to a prediction that the Government in the long run will pay greater prices for its goods and services.

Third, the concept of negotiations envisioned by OFPP allows unequal bargaining with offerors. Although this approach will increase the Government's leverage in particular situations, a basic question exists as to the fairness to the other offerors who are participating simply to give the appearance of competition. This type of negotiation simply may not be fair and equitable—conditions which a citizenry likely expect from its Government.

The possibility of the results discussed above, admittedly only briefly stated in terms of economic possibilities, should give rise to serious concern with the OFPP draft statute. This concern is underlined by the apparent lack of economic analysis undertaken by OFPP.

The prejudice to our economic

system, if the OFPP draft statute in fact diminishes competition, could be significant. A reduction in competition in the Government marketplace may lead to greater concentrations of economic power in the commercial marketplace, thereby undercutting competition and the concomitant loss of the benefits of competitive procurement—estimated to be between 15 and 25 percent—will lead to greater expenditures by the Government and a misallocation of resources into the Governmental sector.

These objections at least invite serious rethinking by OFPP of its draft statute and probably mean that the present version of the statute is fatally flawed.

FOOTNOTES

[1] The Office of Federal Procurement Policy (herinafter "OFPP"), located organizationally with the Office of Management and Budget, has been legislatively charged, *inter alia*, to provide "overall leadership in the development and implementation of procurement policies and the coordination of programs to improve the quality and performance of procurement personnel."

[2] 41 U.S.C. §401-12.

[3] P.L. 96-83, 93 Stat. 649, 96th Cong., Ist Sess.

[4] This policy expression is set forth in Section 401 of the Act amendments.

[5] The section, in full, reads:

COMPETITION

> SEC. 101.(a) Executive agencies shall solicit bids from a sufficient number of prospective sources to ensure that the Government's needs for property or service are obtained through effective and efficient competition. Effective and efficient competition will be achieved when there is:
>
> (1) sufficient latitude in an executive agency's expression of its need to permit suppliers to offer alternative solutions or designs;
>
> (2) at least two or more bidders responding independently to an executive agency's solicitation for bids;
>
> (3) an absence of bias or favoritism in the process of soliciting and evaluating bids and making contract awards; and
>
> (4) an expectation of greater benefits flowing from the competition than the combined executive agency and private sector costs of conducting the competition.
>
> (b)Procurement of property and services through noncompetitive procedures is appropriate only when competition cannot practicably be obtained consistent with the needs of the executive agency concerned. When utlizing noncompetitive procedures, the executive agency must be assured that the property or services are obtained at fair and reasonable prices. Circumstances under which a noncompetitive contract may be awarded are limited to the following—
>
> (1) when the property or service to be procured is available only from a single source and no competitive alternatives are available in the marketplace;
>
> (2) when the urgency for the requirement will not permit the delay inherent in competitive bidding, such as in the case of public exigency;
>
> (3) when an award must be directed to a particular contractor in order to maintain an essential industrial capability or for purposes of industrial mobilization;
>
> (4) directed procurement for foreign governments or procurement pursuant to international agreements, or
>
> (5) when an award will be made to a contractor who has proposed an unsolicited, unique idea or innovation to the Government.

[6] This section states:

EVALUATION OF BIDS

> SEC 102.(a) A bid to supply property or services to an executive agency shall be evaluated based on—
>
> (1) the offered price of the property or services and other price-related factors;
>
> (2) the total cost to the Government, including price and maintenance or operating costs over the useful life of the property or services; or
>
> (3) the offered price of the property or services and other factors, including cost, technical, or management factors.
>
> (b) Bids shall be evaluated without discussions whenever the Government's requirements and the terms and conditions of the contract can be sufficiently described to allow the timely preparation and evaluation of bids on a common basis without the need to hold discussions with potential bidders.
>
> (c) Bids shall be evaluated with discussions whenever it is necessary to discuss the Government's requirements or the terms and conditions of the contract with bidders after receipt of bids but prior to award of the contract.
>
> (d) The evaluation methods described in subsections (b) and (c) may be combined whenever it is necessary to conduct the evaluation of bids in successive steps.

[7] 10 U.S.C. §2304(g).

[8] 41 C.F.R. §1-3.805-1.

[9] See *Hearings on H.R. 5532 Before Senate Committee on Armed Services*, 87th Cong., 2nd Sess. (1962) (Statement of Chairman Vinson).

[10] OFPP *Proposal for a Uniform Federal Procurement System* 45 (draft, Oct. 29, 1981) (hereinafter referred to as "Comments").

[11] *Id.*

[12] *Comments* at 49.

[13] *Id.* at 52.

[14] *Id.*

[15] *Id.*

[16] H.R. Rep. No. 1959, 86th Cong., 2d Sess 27 (1960).

[17] NASA PRD 70-15 (Revised Dec. 5, 1975).

[18] *E.g., Sperry Rand Corp.* (*Univac Div.*), 54 Comp. Gen. 408 (1974).

[19] See *Defense Acquisition Circular 76-17* (Sept. 1, 1979), *revised*, *Defense Acquisition Circular 76-18* (Mar. 12, 1979). The provisions are set forth in DAR 4-107.

[20] *Comments* at 47.

[21] *Id.* at 46.

[22] *Briston Electronics*, Comp. Gen. B-190341 (Aug. 16, 1978).

[23] W. Baldwin, *The Impact of Department of Defense Procurement on Competition in Commercial Markets: Case Studies of the Electronics and Helicopter Industries*, Federal Trade Commission (Dec. 1980).

[24] R. Leftwich, *The Price System and Resource Allocation* 212 (3rd ed. 1966).

[25] Smith and Lowe, *Sole Source and Competitive Price Trends in Spare Parts Acquisition*, 15 NCMA L.J. 51, 54 (1982).

[26] Leftwich, *supra* note 24, at 238.

[27] *Comments* at 66.

[28] *Comments* at 54.

[29] See *supra* note 5.

Senator **Danforth**. Next we have Mr. Franz Ohlson, vice president of the Aerospace Industries Association of America. Also, Mr. Vico Henriques, president, Computer and Business Equipment Manufacturers Association. Can we have you both together?

TESTIMONY OF FRANZ O. OHLSON, JR., VICE PRESIDENT, AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC.; AND VICO E. HENRIQUES, PRESIDENT, COMPUTER AND BUSINESS EQUIPMENT MANUFACTURERS ASSOCIATION

Mr. **Ohlson**. Mr. Chairman, unlike my predecessors, I speak for my association, all 50 member companies. Although I have had 48 years of procurement experience from the business side of it, 40 of which were with State and Federal and local agencies, I speak for the AIA today.

I am Franz Ohlson, vice president of the Aerospace Industries Association of America, which represents the Nation's major manufacturers of aircraft, aircraft engines, spacecraft, missiles, and related components and equipment. I appear today on behalf of AIA to present our views on the Proposal for a Uniform Federal Procurement System, submitted by the Office of Federal Procurement Policy to the Congress on February 26, 1982. The opportunity to present our views is appreciated.

By way of background, AIA member companies form the backbone of the industry that responds to the requirements of the defense and space programs of our Nation. Over the years, our companies have gained significant experience with the Federal procurement process, and a keen awareness of the complexities entailed in the procedures by which the Federal agencies fulfill their specifications for goods and services. We believe that by interfacing with the OFPP, the Department of Defense, NASA, and other Federal agencies we have also played a role in improving the procurement process.

In 1969, AIA supported congressional action that led to the Commission on Government Procurement which, at Congress's direction, conducted an extensive study of the Federal procurement process. We worked with the Commission during its 2 years of study and supported many of the recommendations of the Commission, including the need for a central agency to provide leadership in the promulgation of Federal procurement policy and for a uniform Federal procurement regulation. In due course, Congress established the Office of Federal Procurement Policy. Since then, AIA has worked with the OFPP in the development of Federal procurement policies, practices, and procedures, including the current preparation of the Federal Acquisition Regulation. In our opinion, the OFPP has done much to improve the Federal procurement process and should continue to do so.

As to the Proposal for a Uniform Federal Procurement System, we believe that the procurement system set forth therein is feasible and constitutes a step toward solving many of the problems of the present systems. We are strongly supportive of the proposal that would require the description of Government needs in terms of function, as opposed to articulating those needs in precise detail; that is, approaching the particular need from a "what" versus "how" perspective. AIA has urged the adoption of such a policy for many years. Another encouraging objective is the reduction of Government surveillance of contractors. A contractor should be selected and then permitted to perform without continued and in-depth overview by the Government. The new concept of competition which would be on par with sealed bids should also contribute to an improved procurement system. We also endorse the upgrading of the professional work force. Finally, recognition of the profit motive by the removal of limitations on profit or fee will go far to provide appropriate incentives to industry for risk acceptance.

The management structure for the procurement system also appears to have merit. The appointment or designation of procurement executives in Federal agencies to participate in developing the FAR and supplemental regulations necessary to unique needs of agencies should provide a management system with appropriate flexibility and feedback for its maintenance.

As to enabling legislation, AIA believes that the issue of a single statute versus dual conforming statutes will be best resolved by the Congress. We could live with either arrangement.

During the development of the proposed procurement system, industry identified many problems and issues in need of resolution to achieve improvements in the procurement process. These are set forth in appendix C of the proposal. We urge careful consideration of and appropriate action on these problems and issues.

In closing, we note the President's Executive Order 12352 has initiated implementation of much of the procurement system set forth in the proposal. The direction to the Secretary of Defense and the administrators of the General Services Administration and NASA to continue joint efforts toward a single regulation, the Federal Acquisition Regulation, should result in the issuance of that document by the end of this year. Based upon experience with the development of the Armed Services Procurement Regulation—now the Defense Acquisition Regulation—and the 30-odd years needed to bring it to its current structure and operation, we can anticipate some period of time for the development of the FAR. With the OFPP in place, however, a repetition of this learning curve may be avoided, or at least shortened.

I will be pleased to respond to any questions you may have.

Senator DANFORTH. Thank you, sir.

Mr. Henriques.

Mr. HENRIQUES. Thank you, Mr. Chairman. My name is Vico Henriques; I am the president of the Computer and Business Equipment Manufacturers Association.

My association has been involved in the progress of the proposal since its inception in 1980 and has contributed to each stage of the development which led to the final proposal before you today. We totally support the efforts of the Congress and of the OFPP to improve and simplify the Federal procurement system through legislative reform.

The message that I have today is that much of our commercial experience can benefit the U.S. Government, which we have shared with OFPP, both in terms of procurement practices and in cost savings to the using agencies. These benefits can be best realized by statutory recognition that commercial marketplace competition is essential to Government procurement.

In furtherance of this, we support a single statute recognizing and promoting the use of commercial practices, a single set of procurement regulations, and a strong OFPP as currently located in the Office of Management and Budget, but with regulatory authority.

Currently, Federal acquisition of computers and business equipment has evolved into an ineffective patchwork system that fails to acknowledge realities of commercial practices or the needs of agencies. The current system operates as though it were an independent entity, driven by the narrow goals of being able to demonstrate a saving on each procurement per se, rather than trying to acquire the best solution in terms of overall cost and performance.

In a recent survey conducted by GAO of State and local government and private industry, they found that normal computer procurement takes from 2 to 5 months, with a few complicated acquisitions taking up to 22 months. This contrasts sharply with the 3- to 6-year average for major equipment acquisitions in the Federal Government. This time lag unfortunately perpetuates the inability of the Federal Government to exploit fully the benefits of technology in reducing cost, increasing productivity, and improving the delivery of governmental services. The unfortunate truth is that over the last 10 years the Federal Government has fallen from a position of leadership in the utilization of information resource management technology to a point where, with the exception of a few scientific agencies, it is difficult to see that they will ever regain such leadership in the field.

In earlier comments to OFPP, we favored consolidating the two prinicipal existing procurement statutes into a single statute. This is still our recommended course of action. We consider amendment of the statutory base, the alternative favored by larger procuring agencies, to be acceptable only if a consensus cannot be reached on the single statute approach. In any event, in responding to some of the comments that you had for some of the earlier witnesses, we feel that action must be taken in the near term. To walk away from the problem after a decade of effort beginning with the Commission on Government Procurement would be irresponsible on both our parts, industry and Government.

We believe the single statute approach to be the best because commercial practices are best institutionalized through one law, not two. The practices are basically sound and can accommodate the needs of both large and small Government agencies. However well intentioned the continuation of the present statutes might be, the use and interpretation of commercial practices using two statutes would be different with the passage of time.

We feel the language of the law should be very explicit when defining commercial practices. If the Government is to achieve the very desirable goal of buying off-the-shelf commercial products by using simplified descriptions and documentation commonly found in commercial practices, it will need to grant contracting officers more significant latitude in authority and flexibility in contracting. Contracting officers should be able to use normal commercial business practices for commercial products and services, including purchasing agreements, multiple-source contracts, and similar contracting tools. Contract terms and conditions should follow commercial practices to the maximum extent possible.

We also favor multiyear contracts for all civil agencies in the identical context proposed for DOD for both goods and services. Our support for this type of acquisition is based on the widespread use of multiyear contracts in the commercial world. It is fundamental to the philosophy of our industry that it is to the advantage of the Government to follow this type of procurement whenever reasonable and appropriate. For this reason, we have testified in favor of multiyear leasing legislation in the past and supported recommendations that would extend this authority to Federal departments and agencies.

The Government should have whatever advantages multiyear contracting may offer in the same manner and extent as private business and industry, provided that the Government is willing to assume the same responsibilities and degree of commitment which the seller obtains from the buyer in the commercial marketplace.

In addition to the above tools for efficiently and effectively acquiring a wide range of commercial products and services from multiple segments of the industry, the Government should maintain its "small purchase procedure" for economically awarding low dollar contracts to America's small business.

Finally, the OFPP proposal goes into considerable detail to analyze the concept of competition. We believe this detail is a necessary first step in defining a practical framework for competition in the Government marketplace. While the concept of competition and the conditions necessary for it are clear, nowhere in the draft is the notion of the Government as a customer defined. Lack of such definition in the past has led to fundamental disagreements between the Government and industry over basic business issues. The most serious issues we are currently encountering in our business relationships are the most favored customer concept, an all-encompassing price reduction philosophy, and a lack of recognition that expectations of economic benefit are directly proportional to the size and to the firmness of business commitment. We urge that the statute explicitly define the Government customer not as a single entity but rather as many customers in many marketplaces with a variety of technical, business, and educational requirements. We believe this definition is necessary to establish an equitable buyer-seller relationship.

In closing, I would like to restate our preference for a single Government-wide procurement statute. We believe this approach best harnesses the efficiency and ingenuity of the American business system. Such a statute must articulate basic buyer-seller philosophies which would in turn foster regulations and policies that maximize the use and benefits of standardized commercial practices throughout the Government agencies.

Thank you, Mr. Chairman, for the opportunity to appear. We are ready to extend or elaborate any of these remarks, and I'll be happy to answer any questions you may have.

Senator **Danforth**. Thank you very much, Mr. Henriques.

Let me ask you this: You support a single statute and you support regulatory authority for OFPP. Is your industry, would you say, in a minority in taking that position? Do you have any company in that view?

Mr. HENRIQUES. I think it would be difficult for me to speak for other industries, Mr. Chairman, but it has been our experience over the last 10 years that we would prefer to see regulatory authority in a single spot and we would prefer to see it at the top.

Senator DANFORTH. And your view, Mr. Ohlson, is that you don't care whether it is one place, or do you?

Mr. OHLSON. That's right. That is our view, and I might share with you some of our discussions. You must realize that most of our member companies do business under both the major procurement statutes right now, and we do an awful lot of business with NASA, which you might say operates under an offshoot of the Armed Services Procurement Act. We have learned to live with two statutes. And again, I believe most of us think that if you bring these two together, whether they are single or dual, if they are brought together under an Office of Federal Procurement Policy, they can assure uniform administration and uniform policies.

I think the real solution is perhaps in the strength of the OFPP, and I don't mean necessarily directive strength, because we have been fortunate with our administrators. They have the power of persuasion. They have the OMB in back of them.

So, I think if you look at single or dual statutes, Congress can't resolve the issue. I think it can be resolved through the Office of Federal Procurement Policy, through that administrator and, of course, his superior, the Director of OMB.

Senator DANFORTH. If you had to vote for or against the passage of the bill that the administration has given us in its present form without amendments, how would you vote?

Mr. OHLSON. Personally, I would vote for it. I think there are so many good things in it. As you know, we are discussing only one facet of it.

Senator DANFORTH. How would you vote?

Mr. HENRIQUES. I think we would vote for it, too, but would strive for amendment.

Senator DANFORTH. What is that?

Mr. HENRIQUES. I said, we would strive for amendment. But given your conditions, we would vote for it.

Senator DANFORTH. What do you think of the test idea: Is that necessary, or is that a wasted effort?

Mr. OHLSON. I'm sorry, I didn't get that, sir.

Senator DANFORTH. The tests, the proposed tests, is that a good idea?

Mr. OHLSON. Well, I have to watch previous positions of my association. On many occasions, we have suggested—having bumped into procurement techniques, such as total package and so forth—have advocated on many occasions that before a new procurement technique is introduced, it should go through the same test that you would apply with a developmental airplane. Let's see whether the system works before we commit ourselves to it.

Senator DANFORTH. Do you think the idea of these tests is a good one?

Mr. OHLSON. I don't think in this case you need it.

Senator DANFORTH. Oh. [Laughter.]

Mr. **Ohlson**. I was just making sure that the past position of AIA wasn't thrown back at us. I think in this particular case with the OFPP in place and with the experience that we have gained, I think the test, even if it was needed, should be of very short duration.

Senator **Danforth**. How about you, sir?

Mr. **Henriques**. We think, very simply, the test is not needed. We think there are sufficient trial mechanisms currently in place that could test the system.

Senator **Danforth**. I asked the former administrators whether they felt that this bill strengthened or weakened the hand of OFPP. How would you answer that?

Mr. **Henriques**. I think it weakens it, and I think the previous bill that granted OFPP an extended life also weakened OFPP. I think it has been weakened in each succesive piece of legislation.

Senator **Danforth**. And do you view such successive weakenings with alarm?

Mr. **Henriques**. Yes, sir, we do. As we said, we would like to see a strengthened OFPP centrally located with regulatory authority.

Senator **Danforth**. And what is your opinion?

Mr. **Ohlson**. I am of the same opinion. I think Public Law 93-400, which was the original act, put much more power in the hands of the administrator, and we have always favored that. We thought there should be one central authority with enough wallop to carry out his policy.

Senator **Danforth**. And do you think that this bill weakens the hand of OFPP?

Mr. **Ohlson**. I think it does to that extent, yes.

It calls for leadership and direction. I think that is one of the good features of this bill—providing for each of the agencies to meet its own unique needs and mission needs, but with supplemental regulations always staying within the fire, of course, of the overall controlling document. I think there is enough flexibility in there why every agency—I see no reason why they should be worried about it.

Senator **Danforth**. Do you think I was given some good advice: Get everybody together? Do you think that is possible, or is that a pipe dream? Can DOD and OFPP and OMB, Senator Tower, Representative Price——

Mr. **Henriques**. I think it would be a very interesting meeting, and I would certainly like to be a fly on the wall when you, Mr. Brooks, Mr. Tower, and some of the others sit down together. I think it is entirely possible that when the suspected, perhaps more than real, turf problems that people keep exacerbating are really looked at they could be easily solved.

Senator **Danforth**. Easily solved.

Do you agree with that, Mr Ohlson?

Mr. **Ohlson**. I think there is going to be blood on the floor, but I think it can be resolved. After all, our Nation is a Nation based on compromise, and I think all reasonable men will compromise on the best for the Nation. Yes, I think it is feasible.

Senator **Danforth**. Gentlemen, thank you both very much for being here.

[The prepared statement of Mr. Henriques follows:]

STATEMENT OF
VICO E. HENRIQUES, PRESIDENT
COMPUTER AND BUSINESS EQUIPMENT MANUFACTURERS ASSOCIATION
BEFORE THE
SUBCOMMITTEE ON FEDERAL EXPENDITURES, RESEARCH AND RULES
COMMITTEE ON GOVERNMENTAL AFFAIRS
MAY 5, 1982

Thank you Mr. Chairman. The Computer and Business Equipment Manufacturers Association appreciates the opportunity to appear before your Subcommittee to offer comments on the Proposal for a Uniform Federal Procurement System. CBEMA has been following the progress of the Proposal since its inception in 1980 and has contributed to each stage of its development which lead to the final Proposal before you today. We totally support the efforts of the Congress and the Office of Federal Procurement Policy to improve and simplify the federal procurement system through legislative reform.

Our organization includes both large and small manufacturers of automated data processing and office equipment. During 1981, our members had total worldwide industry-related revenues in excess of $50 billion and employed about 750,000 people. CBEMA member companies make a large and positive contribution to the U.S. balance of trade. In 1981, exports of computers and business equipment exceeded imports by seven billion dollars.

Our members compete in a worldwide market where continuous development and timely introduction of high technology products are the rule, not the exception. We are an industry where technology has advanced with unbelievable rapidity - where in two decades the cost of a computer transaction has been reduced 126 times and where even the shrunken dollar can buy 44 times the memory capacity of twenty years ago.

Our message today is that much of this commercial experience can benefit the United States Government; both in terms of procurement practices and in cost savings to the using agencies. These benefits can best be realized by statutory recognition that commercial marketplace competition is essential to government procurement practices.

In furtherance of this goal we support a single statute recognizing and promoting the use of commercial practices, a single set of procurement regulations, and a strong Office of Federal Procurement Policy as currently located in the Office of Management and Budget but with regulatory authority.

The Current Procurement System is Unresponsive and Inefficient

Federal acquisition of computers and business equipment has evolved into an ineffective patchwork that fails to acknowledge the realities of commercial practices or the needs of user agencies. It fails to reflect the fact that rapid technological advancements require continual enhancement of both simple and complex systems to optimize the rate of return on capital investments. The current acquisition system operates as though it were an independent entity, driven by the narrow goals of being able to demonstrate a saving on each procurement per se, rather than trying to acquire the best solution in terms of overall cost and performance.

In a recent survey of state and local government and private industry, GAO reported that the normal computer procurement takes from two to five months, with a few complicated acquisitions taking up to 22 months. This contrasts sharply with the three to six year average time for major equipment acquisitions in the Federal Government. This time lag perpetuates the inability of the Federal Government to exploit the full benefits of technology in reducing cost, increasing productivity, enhancing management decision making and improving the delivery of governmental services. The unfortunate truth is that over the past ten years, the Federal Government has fallen from a position of leadership in the utilization of information resource management technology to a point where--with the possible exception of a few scientific agencies--it lags far behind the private sector.

The cost of obsolescence can be measured in any number of ways: in excessive personnel expenses, in poor utilization of space, subpar performance of the basic mission, and so forth. A DoD report demonstrated that personnel costs alone were often larger using obsolete technology than the total cost would be to perform the job on current systems.

Use Commercial Practices in the Government Marketplace

In its earlier comments, CBEMA favored consolidating the two existing procurement statutes into a single statute. This is still our recommended course of action. We consider amendment of the statutory base - the alternative favored by larger procuring agencies - to be acceptable only if a consensus for action cannot be reached on the single statute approach. In any event action must be taken in the near term. To walk away from this problem after a decade of effort beginning with the Commission on Government Procurement would be irresponsible on both of our parts.

We believe the single statute approach to be the best approach because commercial practices are best institutionalized through one law, not two. These practices are basically sound and can accommodate the needs of both large and small government agencies. However well intentioned the continuation of the present statutes might be, the use and interpretation of commercial practices using two statutes would be different with the passage of time.

The language of the law should be very explicit when defining commercial practices. If the Government is to achieve the very desirable goal of buying off-the-shelf commercial products by using simplified descriptions and documentation, commonly found in commercial business practices, it will need to grant contracting officers more significant latitude in authority and flexibility in contracting. The contracting officer should be able to use normal commercial business practices for commercial products and services including purchasing agreements, multiple-source contracts, and similar contracting tools which enhance efficiency and effectiveness in the lease, purchase and support of commercial equipment. Contract terms and conditions should follow commercial practice to the maximum extent possible.

CBEMA favors multi-year contracts for all the Civil agencies in the identical context proposed for DoD for both goods and services. Our support for this type of acquisition is based upon the widespread use of multi-year contracts in the commercial world. It is fundamental to the philosophy of our industry that it is to the advantage of the Government to follow multi-year procurement practices whenever reasonable and appropriate. For this reason, CBEMA has testified in favor of multi-year leasing legislation in the past and supported recommendations that would extend this authority to Federal departments and agencies.

The Government should have whatever advantages multi-year contracting may offer in the same manner and extent as private business and industry, provided that the Government is willing to assume the same responsibilities and degree of commitment which the seller obtains from the buyer in the commercial marketplace.

In addition to the above tools for efficiently and effectively acquiring a wide range of commercial products and services from multiple segments of American industry, the Government should maintain its "small purchase procedure" for economically awarding low dollar contracts to America's small business.

Finally, the OFPP Proposal goes into considerable detail to analyze the concept of competition. We believe this detail is a necessary first step in defining a practical framework for competition in the Government marketplace. While the concept of competition and the conditions necessary for it to be effective are clear, nowhere in the draft is the notion of the Government as a customer defined. Lack of such definition in the past has led to fundamental disagreements between the Government and industry over basic business issues. The most serious issue we are currently encountering in our business relationships are the most favored customer concept, an all-emcompasssing price reduction philosophy, and a lack of recognition that expectations of economic benefit are directly proportional to the size and firmness of business commitment. We urge that the statute explicitly define the Government customer, not as a single entity, but rather as many customers in many marketplaces with a variety of technical, business and educational requirements. We believe this definition is necessary to establish an equitable buyer-seller relationship at the start of the acquisition process.

Summary

In closing we again state our preference for a single government-wide procurement statute. We believe this approach best harnesses the efficiency and ingenuity of American business enterprise. Such a statute must articulate basic buyer-seller philosophies which would in turn foster regulations and policies that maximize the use and benefits of standardized commercial practices throughout government procurement agencies.

Thank you for the opportunity to appear. We are ready to extend and elaborate on any of these remarks and I'll be happy to answer any questions you might have.

Senator **Danforth**. That concludes the hearing.

[Whereupon, at 4 p.m., the subcommittee was adjourned, subject to reconvene at the call of the Chair.]

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

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the Helicon group, ltd.

Post Office Box 178
Jamison, PA 18929

Statement of the Helicon group, ltd. to the Subcommittee on Federal Expenditures, Committee on Governmental Operations, United States Senate on "Proposal For A Uniform Federal Procurement System", December 4, 1981

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The Helicon group, ltd. appreciates the opportunity to present its views on the Office of Management and Budget's "Proposal For A Uniform Federal Procurement System" (Draft October 29, 1981) to the Subcommittee.

Helicon is a management consulting firm, located in Bucks County, Pennsylvania. We feel that we are a firm with a difference: we assist those who may hire and use consultants and experts to do so more efficiently and effectively.

Miss Carolyn M. Vella, the President of Helicon, is an authority in the area of human behavior and management techniques. Mr. John J. McGonagle, Jr., Vice President of Helicon, is an attorney and an economist. In addition to Mr. McGonagle's recent book, "Managing The Consultant--A Corporate Guide", Helicon's officers have written a number of other papers dealing with governmental procurement and with the use of consultants. They are listed at the end of this statement. During 1982, Helicon will be presenting a series of two day seminars for the American Management Associations on the effective use of experts and consultants.

In reviewing the "Proposal", we had high hopes that OMB would finally attack the many problems which the Federal Government has had in the retention and use of providers of services, including consultants. Sadly, the "Proposal" does not.

We feel that the "Proposal", as presented to the Subcommittee, fails to address several key issues in the procurement of goods and services by the Federal Government. These failures fall into five basic categories:

A confusion about the underlying economic principles involved in government procurement

An implicit decision to relegate small businesses to a second-class status in procurement

A decision to avoid resolving the hard questions already raised in the procurement of consulting and professional services by the Federal Government

A reluctance to approach the issue of apparent conflicts of interests by former government and private sector employees

A decision to avoid providing any direct enforcement mechanisms

I. Underlying Objectives

The "Proposal" talks broadly about "competition" in the purchase of goods and services by the Federal Government. What the "Proposal" fails to recognize is that what is being operated is not a classic competative situation. Rather it is a classic monopsony, a monopoly on the buyer's side in many purchases. Given the monopsony position of the Federal Government, its purchasing decisions and their results on the sellers of goods and services will not have the same impact and cannot operate in the same manner as if they were made in a free and competative market.

The "Proposal" does not recognize that efficiency in procurement for Federal agencies does not call for the same procedures as those which are fair and equitable to federal contractors. To some degree, these are conflicting, not compatible, objectives. In fact, nowhere in the "Proposal" is there any recognition that the set of objectives on which it is based are and will always be contradictory to some degree. Thus, rather than asserting that the "Proposal" satisfies all of the objectives, the Congress and OMB must assign them relative priorities and decide which are more important.

In addition, as discussed further below, the concepts of competition as espoused by OMB are not applied by it to the acquisition of services. Apparently OMB does not believe that providers of services can compete on the bases of price and quality, just as the providers of goods do.

II. Small Businesses

The "Proposal" treats the small business set-aside program as akin to a welfare program. Its treatment means that the program's continuation should be justified on social welfare grounds only, as it lacks any valid economic or management foundations. Such an attitude is an affront to small businesses.

The Federal Government was pulled into the recovery efforts resulting from the failure or near failure of such large firms as the Penn-Central, Lockheed, and Chrysler. This vulnerability demonstrates the significant danger to the Federal Government of concentrating its procurement in a small number of large firms.

The "Proposal" advocates a further decentralization of the purchasing authority and an increased use of mechanisms other than advertised competative bidding through the Commerce Business Daily. The combined effect of these proposals is to require potential suppliers to find their way to and through a maze of 1300 procurement centers to locate those officers who might, but do not have to, contact them if a potential procurement opportunity comes along. This means that any small firm located outside of the District of Columbia area can count on being virtually excluded from significant parts of the procurement process. Even now, as the Small Business Administration openly advises, the only effective way for a small business to get work is to meet the program and contracting officers, that is come to Washington, D.C.

Small businesses cannot afford to do this even now, so the proposed system will serve to exclude small businesses even more than it does now. The set-aside program has served to counterbalance this tendency. If removed, small businesses outside of the District of Columbia will be effectively excluded from future government purchases.

III. Consulting and Other Services

One of the most glaring weaknesses of the "Proposal" is its admitted failure to even address the persistant issues involved in the use and misuse of consulting services by the Federal Government.

OMB's refusal to deal with this issue is reflected in its general approach to the purchase of services by the Federal Government. In discussing competition, the idea of potential competition among the suppliers of all services is rarely mentioned.

Evidently OMB wishes to continue in the world of the past where it was unprofessional and often illegal for professional service providers to compete on the basis of price. Thanks in part to the actions of the Antitrust Division over the past decade, that is no longer the case. Yet OMB continues on the same path as it has in the past. That path is to treat the purchase of services, a major and growing sector of our national economy, as a relatively minor element in Federal procurement, and not subject to the rigors of competative, objective evaluation against objective price and quality standards. Today's practices are implicitly condoned and will presumably be permitted to continue. By their very nature, they put the program and contracting officers in the position of judging providers of services not on the basis of their price and proposal, but on the basis of their "reputation". To put it more bluntly, the test is too often whether the firm's name is "known" and whether the firm's personnel previously served in the contracting agency.

OMB does not address itself to a related procurement problem, "steering" supposedly competative soliciations for services by carefully structuring the "requirements" needed in order to bid. OMB recognizes that product specifications have been too rigid, but ignores the related problem in the services area.

IV. Conflicts of Interest

In dealing with the personnel aspects of procurement, OMB has ignored a problem which has persisted in civilian and military procurement for years---apparent conflicts of interest.

These conflicts evidence themselves in numerous forms, all of which undermine the faith of the citizen in the impartiality and efficiency of the Federal Government:

> A contract is given to a company which has recently hired a senior manager from the contracting unit.

A contract is signed obtaining the services of a former civil servant or political appointee by the unit which he or she recently left.

A contract is awarded by or supervised by a former employee of the company under contract.

A contract is awarded to a contractor and is supervised by an employee of the agency who later joins the contractor.

Something more than a bland promise of a future "code of ethics" is needed. Perhaps a requirement which "screens" out former program and contracting officers of an agency when they join the private sector is needed. In any case, the requirement must be one which is both enforceable and enforced.

V. Lack of Enforcement

OMB's "Proposal" promises that the proposed system will "resolve" a host of current problems. This approach ignores the fact that the new system will be put into place by, administered by, and serve the needs of the individuals and organizations who have not conformed to previous procurement requirements and suggestions by the Congress and OMB. Why OMB expects yet another new system to change old people and patterns is unknown. The idea smacks of the older claims of the benefits of management systems which failed because they ignored the human element. Given those experiences, we can expect this approach to suffer the same fate.

If it were not enough that the system will be counted on to solve numerous problems, the system itself is deficient. No one enforces it under the "Proposal". Many agencies have various roles, but no one person or agency has the responsibility and power to force procurement and program officers, and even the agencies themselves, to follow the new rules. No one has the responsibility and power to monitor adherence and to impose direct sanction for failures to comply. Why should these people and agencies follow new rules in the future when they have not done so in the past is a mystery whose solution is known only to OMB and which is not shared with us in the "Proposal".

Summary

In short, OMB's "Proposal" is neither complete nor a solution. Its defects in the areas discussed above are so severe that we feel that the entire process should be halted before it continues any further. Under OMB's own timetable, it will not be until mid 1984 that the "fine-tuning" of the proposed system will be complete. At that time, the Congress will be faced with the same problems it is facing now. The only difference will be that they will be older and more severe.

Materials on Consulting Services and Government Purchasing

Carolyn M. Vella, Statement Before the Pennsylvania State House Subcommittee on Small Business [Doing Business With The Government] (November 4, 1981).

John J. McGonagle, Jr., Managing The Consultant--A Corporate Guide (Chilton Book Company, 1981).

Carolyn M. Vella and John J. McGonagle, Jr., "Contracting With Consultants" (Presented to the Committee on Continuing Legal Education of the Bucks County Bar Association, November 18, 1981).

Carolyn M. Vella, "Observations on Corporate Society and Creative Thinking" (November 23, 1981).

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January 15, 1982

The Honorable John C. Danforth
Chairman
Subcommittee on Federal Expenditures, Research
and Rules
Committee on Government Affairs
U. S. Senate
Washington, D.C. 20510

Re: December, 1981 Hearing on Proposed
Uniform Federal Procurement System.

Dear Senator Danforth:

We understand that the Subcommittee on Federal Expenditures, Research and Rules held hearings in December, 1981 on the proposed Uniform Federal Procurement System (UFPS).

The proposed UFPS would drastically alter the current system under which the Federal Government acquires goods and services. We believe the proposal is seriously flawed and would ultimately result in less competition, higher prices and lower quality products than is provided under the current system.

We only recently learned of these hearings and would appreciate your including this letter and attachment in the official record of the proceedings. The attachment is a copy of comments we filed with the Office of Federal Procurement Policy regarding the proposed UFPS. Those comments and this letter are submitted on behalf of our client, Jebco, Inc., of Warrenton, Georgia.

Thank you for your attention to this matter.

Very truly yours,

Henkel, Hackett, Edge & Fleming

By: Stanley H. Hackett

SHH/vb

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December 8, 1981

Office of Federal Procurement Policy
Office of Management and Budget
726 Jackson Place, N.W.
Room 9103
New Executive Office Building
Washington, D.C. 20523

Re: Proposal for a Uniform Federal
Procurement System.

Gentlemen:

We have carefully reviewed the recently published Proposal for a Uniform Federal Procurement System (hereinafter the "Proposal"), and would appreciate your careful review of the comments which follow. These comments are submitted on behalf of our client, Jebco, Inc., of Warrenton, Georgia. Pursuant to a recent telephone conversation with a representative of your office, we were advised that comments would be accepted through December 11, 1981.

1. Jebco, Inc.

Jebco, Inc. (Jebco) is a contract manufacturer of metal office furniture located in Warrenton, Georgia. It has supplied products to agencies of the federal government for some 25 years, and its principals are quite familiar with federal procurement practices, policies and problems, particularly in the metal office furniture industry. A review of your correspondence files will reflect Jebco's long-standing and very serious interest in the maintenance of federal procurement policies which do not deny it, and other similarly-situated, responsible contractors, the right to compete for federal government contracts. For your ready reference, attached to this letter are copies of recent correspondence concerning this issue.

2. General Comments on the Proposal.

At first blush, the Proposal appears to be an effort to develop a procurement system which emphasizes flexibility as opposed to rigidity, thus permitting the government to deal with its suppliers in the most efficient and effective fashion. It proposes to delegate authority to lower levels, eliminate unnecessary paperwork and formalities, and decentralize agency procurement operations. However, on careful examination, the Proposal is deficient in several critical aspects. 1) The fundamental thrust of the Proposal does not in fact address the problem of rigidity. Rather through the creation of a statutory preference for procurement of commercial products through commercial distribution channels, the Proposal simply replaces one rigidity with another. Furthermore, while the "commercial" method of procurement may be the best with respect to some products, it is not always the best with respect to all products. Jebco contends that it most certainly is not the best method in connection with the purchase of metal office furniture. 2) The Proposal appears to encourage decentralized purchasing on an agency-by-agency or even office-by-office basis. This emphasis ignores the obvious benefits of bulk buying.

3. Statutory Preference for Commercial Products.

The Proposal calls for a legislative change to statutorily "...establish a preference for the use of commercial products to meet the Government's needs". "Commercial products" are defined as "...property or services which are regularly sold or made available to the public at established catalog or market prices."

The preference appears reasonable enough on its face. However, it ignores the realities of the metal office furniture industry.

In the first place, there is no "normal" standard of metal office furniture in the commercial market place. Rather, there is a wide variety of metal office furniture as to quality, size, color, price, style, and virtually every other variable. A purchaser must define what it wants, or else it has no base of reference upon which to make comparisons. It cannot simply buy "desks" or "cabinets" any more than it can simply buy "airplanes" or "automobiles". The need must be first defined. This, of necessity, requires some kind of description, although the description need not be as detailed as existing Government specifications or even commercial item descriptions. Furthermore, simply because an item is sold in the commercial market place does not mean that it meets any given performance standard. Some furniture is made cheap and sold cheap; it meets a certain demand. Other furniture is of higher quality and more expensive; it meets another demand. The purchaser must decide which one it wants, and the only realistic way to reflect this decision is through a definition.

As we have called to your attention previously, office furniture is a somewhat unique product in that it generally must coordinate. In other words, desks, credenzas, file cabinets and other furniture in an office typically must be the same color and style and be otherwise compatible. Commercial buyers rarely buy one type of metal office furniture which does not match others. As a result, to be viable in the commercial market place, a producer must offer a fairly complete line of compatible metal office furniture at all times. In the past, the Government has achieved desired coordination through specification. Under the commercial products concept, the Government would achieve coordination only by buying from companies offering a fairly complete line of furniture at all times. The effect of this will be to concentrate federal purchases of metal office furniture in the hands of a few large manufacturers of broad lines. Obviously this is anti-competitive. However, to deal with the "anti-competitive" objection, the Proposal would simply re-define competition from "full and free" to "efficient and effective". The Proposal makes clear that this new standard of competition would be satisfied by going to as few as two producers. We again call to your attention that not every manufacturer of metal office furniture has the financial resources to become a full commercial operation. Jebco, as well capitalized as it is, does not have the resources to establish a full-line, on-going commercial operation. What Jebco has proven that it can do, however, is produce a quality product, desired by the Government, at a competitive price. Yet under the Proposal, Jebco will be precluded from even bidding simply because it does not regularly sell to the public.

Seen in its true light, the Proposal is nothing less than an odious grab by the large manufacturers for a virtual monopoly on supplying the Government with metal office furniture. For whatever reason, large manufacturers apparently find it difficult to compete fully and freely with the Jebco's of this world. However, instead of reducing prices, which is the normal response to competition, the response articulated in the Proposal is to eliminate competitors such as Jebco simply by re-defining them out of the system. Wittingly or unwittingly, this is precisely what the Proposal will accomplish. The bottom line is that, under the Proposal, the Government will deal with fewer suppliers on a selective basis and at a higher cost. With decentralized purchasing and no "full and free" competition, contracts will be negotiated at the local country club instead of through the scrutiny of public bids. The Proposal will foster "country club procurement" at its worst with the price of the product determined by the size of the ham.

4. Recommendations.

Jebco requests that the Proposal be modified to provide that there be no across-the-board statutory preference for commercial products, but that this be just one of the options available to purchasing agents. If the Government's need is such that buying commercial products in the commercial marketplace makes the most sense, then purchasing agents should have the discretion to do so. However, they should not be required to do so. If a quality product can be acquired at a better price by some other method - for example, by advertising for bids for specific products from contract as well as commercial manufacturers - then the agent should have the discretion to use that method.

5. Note.

Under the "due process" clause of the United States Constitution, legislation must have a basis in fact to be valid. There is no factual basis to support an inclusive statutory presumption that favors commercial products over contract manufactured products to such an extent that the latter manufacturers are excluded from even bidding for a contract.

Respectfully submitted,
Henkel, Hackett, Edge & Fleming

By: Lee H. Henkel, Jr.

Stanley H. Hackett

/vb

(From Contract Management,
February 1982 (National Contract
Management Association))

Reforms in Federal Procurement: The GAO Perspective

by Charles A. Bowsher

The theme "A New Beginning" strikes a responsive chord with me, for I too have now undertaken a new beginning with my recent appointment as comptroller general of the United States. I hope to carry on the fine tradition of my predecessor and to provide leadership that will build on the advancements and outstanding GAO reputation achieved during his term. I believe it is essential that we continue to strive for more efficient and effective government management and administration. I intend to maintain and strengthen, where possible, GAO's ability to provide a wide range of legal, auditing, and program review services to help the Congress more effectively carry out its legislative, appropriation, and oversight responsibilities.

ABOUT THE AUTHOR

Charles A. Bowsher was appointed comptroller general of the United States last year to serve a 15 year term. He was the banquet speaker at the NCMA National East Coast Symposium last November. CM is proud to present the full text of his address.

I would like to summarize for you some GAO viewpoints on what is happening in respect to long-overdue reforms in federal procurement. There is no single subject in GAO's history that has received more continuous attention.

As you know, there are two landmark efforts underway today. One of them is the congressionally-mandated proposal for a Uniform Federal Procurement System. The other is the set of initiatives launched by secretaries Weinberger and Carlucci to reform the defense weapons acquisition process.

The Uniform Federal Procurement System (UFPS)

The GAO staff has been closely monitoring the development of the Uniform Procurement System since Don Sowle's selection by the President to head the Office of Federal Procurement Policy early this year. We know the struggle in which he and his staff have been engaged—along with his superiors at OMB and dozens of federal procurement experts—to enunciate a total basic system which is comprehensive, comprehensible, and concerned with procurement fundamentals. I think we can recognize Don's leadership with an "A plus."

All of us will undoubtedly have some different points of view as to the best solutions to the serious and persistent procurement problems facing the federal government. But Don and his staff have certainly identified the fundamental problems that need correction and have set out a thought-provoking and comprehensive plan to address these problems.

To assist in the dialogue which will take place in the coming months, I would like to spend a few minutes discussing the elements of the ultimate action plan wich GAO feels are essential, and against which we will study, with great care, the draft document issued by OFPP in late October. (For Executive Summary of the draft, see *CM*, December, 1981, p. 4).

First, the plan deals with revisions to modify, eliminate and simplify procurement laws and regulations. We strongly endorse a new modern statutory basis for the system, which in turn will form the foundation for the new simplified regulation. Long overdue are the proposed revisions such as those to authorize multiyear procurement and to raise the small purchase threshold. We also feel that a policy of reliance on the private sector needs statutory basis, as proposed by the Commission on Government Procurement. We do find ourselves, however, in need of a better understanding of the rationale for perpetuating dual statutes, instead of a single government-wide procurement statute, and as to how OFPP would assure that dual statutes are conformed.

Second, the plan sets out a major blueprint for improving organization and management systems, to enhance accountability and control over the procurement process. We applaud the strong oversight role prescribed for OFPP, working with a network of agency procurement executives who are responsible for agency-wide systems. These actions, if skillfully executed, can literally change the procurement process, particularly in the civilian agencies where such leadership has long been lacking. It can open the way to applying the best practices in all agencies under the leadership of OFPP. These initiatives, in our view, are urgent and we are pleased that the plan envisions progress as early as next March.

Third, the plan proposes to foster increased competition and to encourage innovations in satisfying the government's needs for goods and services. This is one of the most imaginative and far-reaching group of proposals in the draft plan. I suspect. that realization of these goals will require much patience and perseverance, and the willingness to experiment. There is no question that our traditional concepts of competitive procurement need to be modernized to stress greater use of market research and flexible specifications. At the same time, the long-assumed values of formal advertising and "free-and-open competition" should not be lightly abandoned without assurances that the government not only has enlightened business practices, but also adequate controls to assure fairness and equity to those qualified suppliers who desire to compete for its awards.

The fourth major set of proposals in the plan calls for vigorous steps to develop a high quality work force. I am sure we can all agree that for the long pull this may be the most important part of the new procurement system. We are pleased with the proposed assignment of responsibility to OFPP to foster and promote programs of work force development and to make each agency procurement executive responsible for adequate training, certification and career development within his agency. While OFPP should share leadership with the Office of Personnel Management, we believe it should be made clear that OFPP must be accountable for assessing the adequacy of these programs, and for reporting on any deficiencies to the President and to the Congress. We are aware of current concerns in the procurement community with the tentative classification and qualification standards for personnel series GS-1102, and we plan to monitor its developments closely.

In the area of pre-and-post award remedies, the draft plan does not make any specific recommendations. We feel that this area is properly a matter for continuing oversight by OFPP as provided by the Contract Disputes Act with respect to boards of contract appeals. As to bid protests, we in GAO want the bid protest forum to be as effective as possible, and we will welcome ideas and suggestions for improvement from interested parties outside of GAO.

In summary, we think OFPP has laid out a useful blueprint of the issues and the near-term objectives on which we can all agree, while providing a set of alternatives for final consideration before statutory decisions are made.

New Initiatives in Defense Management

Now I would like to comment on the initiatives which have been proposed by secretary Weinberger and deputy secretary Carlucci. They have high potential for improving the efficiency of defense procurement practices while reducing the cost of defense weapons. These initiatives are among the most far-reaching and ambitious attempted by a secretary of Defense.

In mid-October one of the witnesses before a Senate Committee on Governmental Affairs hearing, Professor Laurence Lynn of Harvard, made a statement which I think captures the importance of this area. He said:

> "Managing weapons acquisition in order to achieve the desired reforms is probably the most difficult management problem facing any American executive, public or private."

We at GAO can attest to the accuracy of this observation. It is the reason that one of our major divisions is devoted almost exclusively to audits and reviews in this area.

Perhaps the most important of the defense initiatives is the one intended to assure the implementation of acquisition process management improvements. As stated in this initiative, the planned changes will not succeed without a "... relentless implementation phase." We agree. There have been numerous studies and recommendations going back a number of years, but Defense still struggles to control a process that it has been practicing for many years. As experience has shown, only persistent effort will effect improvement.

GAO has historically supported multiyear contracting and we support the present initiative to encourage its use on major weapon systems, when it is based on a case-by-case benefit/risk analysis. Although the DOD criteria appear sound for making multiyear contract decisions on a case-by-case basis, there also appears to be a need for a continuous analysis which displays the cumulative funding commitment for future years. This would enable the Congress to decide, depending on the merits of an individual contract, whether its future year authorization and appropriation prerogatives are being overly restricted.

We also support the DOD effort to implement preplanned product improvement, as a means to lower weapon system technological risks and their attendant production and performance problems. This approach provides for the preplanned evolutionary upgrading of deployed systems and is designed to avoid the premature introduction of advanced technology that is not realistically ready for application during initial production. We recently issued a report to Defense discussing the benefits of this method and recommended some key procedures that should be considered.

In the past, the secretary of Defense maintained oversight of major programs through a process of reviewing progress at four key program transition points. These four reviews have now been reduced to two, one to be sometime after the Service initiates the program and the other when a preliminary design is developed in the engineering phase. We believe decisions that involve a major expenditure of defense resources should be approved—both prior to the Services' initiation of the program and when the commitment to production is actually made. Decisions validating concepts and authorizing follow-on production are operating level decisions that could be left to the Services. If properly implemented, this initiative should provide proper review.

Another initiative outlines several suggested actions to be taken by DOD to increase productivity in the defense sector of the U.S. economy. While we do not have serious reservations regarding most of the proposed actions, we oppose DOD's recommendation to amend or repeal Cost Accounting Standard 409 "Depreciation of Tangible (Capital) Assets" without considering other related cost accounting standards.

A major problem identified by program managers and other defense officials has often been the lack of consistent and sufficient funding to carry out a weapon system program as planned. This is caused to a great extent by the intense competition between the many programs for a share of the defense budget. Defense officials, past and present, have acknowledged that there are too many weapon systems programs as compared to the dollars available. The steering group that developed the management initiatives reported that too many systems were competing for scarce resources. There has been a reluctance to "weed out" low priority programs in order to fully fund and efficiently execute the higher priority programs. Earlier, in February 1981, the secretary of Defense had highlighted to the Service secretaries and others the importance of identifying for elimination, cancellation, or reduction marginal weapon systems.

The results of OSD's efforts were announced in early October by Dr. DeLauer, when he identified several RDT&E and procurement programs he was recommending for cancellation. The rationale varied, but a number were terminated because they did not have well defined requirements. We congratulate Dr. DeLauer on this action.

New CG Positive Mental Attitude

In conclusion, I want to assure you that sound improvements to the federal procurement system will remain as one of our highest priorities during my term of office. We, as a nation have long ago decided to rely primarily on the private sector to build our ships, our airplanes, our missiles, and to develop and design our computer systems. Our ability to utilize the full resources of our economy in World War II amazed the rest of the world. Now many countries such as Japan, Germany and others have copied that model. However, we in turn, have developed a more and more bureaucratic and legislative approach to procurement—to the point where it has been my experience, both recently as a member of the private sector and previously in the government sector, that we practically insure cost growth and delays in delivery of goods and services because of our inability to run an efficient and effective procurement system.

This situation results in the government not being able to build or buy what it needs when it needs it. Needless to say, this is not a very satisfactory position for our great nation. Therefore, I hope that we are on the threshold of a new beginning and of substantial change for the better, and that we are about to formulate and execute a new procurement policy that works—a policy that delivers quality goods and services on time and at a reasonable cost.

We at GAO want to assist in whatever manner we can, and of course in the end, we will review and report on the outcome of this great endeavor that our nation so badly needs. □

II

Calendar No. 946

97TH CONGRESS
2D SESSION

S. 2127

To revise the procedures for soliciting and evaluating bids for Government contracts and awarding such contracts, and for other purposes.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 23 (legislative day, FEBRUARY 22), 1982

Mr. COHEN (for himself, Mr. ROTH, Mr. LEVIN, Mr. PROXMIRE, Mr. MITCHELL, Mr. HEINZ, Mr. EAST, Mr. PRYOR, Mr. RUDMAN, Mr. KASTEN, and Mrs. HAWKINS) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

OCTOBER 1 (legislative day, SEPTEMBER 8), 1982

Reported by Mr. ROTH with an amendment in the nature of a substitute

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

To revise the procedures for soliciting and evaluating bids for Government contracts and awarding such contracts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, ~~That this Act may be cited as the "Competition in Contracting Act of 1982".~~

~~TITLE I—AMENDMENTS TO FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT OF 1949~~

~~COMPETITIVE AND NONCOMPETITIVE PROCEDURES~~

~~SEC. 101. (a) Title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 et seq.) is amended—~~

~~(1) by striking out section 303 (41 U.S.C. 253) and the heading of such section and inserting in lieu thereof the following:~~

~~“COMPETITION REQUIREMENTS~~

~~“SEC. 303. (a) Except as provided in subsection (b), executive agencies shall use competitive procedures in making purchases and contracts for property and services. In using competitive procedures, executive agencies shall solicit bids without bias or favoritism with respect to any prospective source and in a sufficient number to ensure that effective and efficient competition for the purchase or contract is achieved.~~

~~“(b) An executive agency may use noncompetitive procedures in making purchases and contracts for property and services only when—~~

~~“(1) the property and services needed by the Government are available from only one source and no other type of property or services will satisfy the needs of the executive agency;~~

~~“(2) the executive agency’s need for the property or services is of such urgency that the Government would be seriously injured by the delay involved in using competitive procedures;~~

~~“(3) it is necessary to award the contract to a particular source in order to maintain an essential industrial capability in the United States or to achieve national industrial mobilization;~~

~~“(4) the terms of any agreement with a foreign government, or the directions of any foreign government reimbursing the executive agency for the cost of the procurement of the property or services for such government, have the effect of requiring the use of noncompetitive procedures;~~

~~“(5) a statute requires that the procurement be made through another executive agency or a specified source; or~~

~~“(6) the disclosure of the executive agency’s needs to more than one source would compromise the national security.”;~~

~~(2) by adding at the end of section 309 (41 U.S.C. 259) the following new subsections:~~

~~“(b) The term ‘executive agency’ has the same meaning as provided in section 4(a) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(a)), except that such term~~

~~does not include the departments or establishments specified in section 2303(a) of title 10, United States Code.~~

~~“(c) The term ‘competitive procedures’ means procedures under which an executive agency makes a purchase or enters into a contract after providing the solicitation documents to more than one source.~~

~~“(d) The term ‘noncompetitive procedures’ means procedures under which an executive agency makes a purchase or enters into a contract after providing the solicitation documents to only one source.~~

~~“(e) The term ‘source’ means any individual, firm, unincorporated association, joint venture, partnership, corporation, or any affiliate thereof, which submits, intends to submit, or is selected by an executive agency to submit a bid for a contract.~~

~~“(f) The term ‘contract’ means a written agreement for the procurement of goods or services, including amendments and modifications to any such agreement, entered into by an executive agency and a source which has submitted a bid.”; and~~

~~(3) by adding at the end thereof the following new sections:~~

~~“SOLICITATION REQUIREMENTS~~

~~“SEC. 311. (a) Each solicitation for bids under this title shall include—~~

~~"(1) a description of—~~

~~"(A) all factors, including price, which the executive agency reasonably expects to consider in evaluating bids submitted in response to the solicitation; and~~

~~"(B) the relative importance which the executive agency assigns to such factors;~~

~~"(2) to the maximum extent possible, consistent with the needs of the executive agency, such description of the executive agency's objectives in procuring the property and services, or of the intended functions of the property or services, as will promote the submission of bids to furnish any of a variety of types or designs of property or services which achieve such objectives or perform such functions;~~

~~"(3) a statement that—~~

~~"(A) bids will be evaluated with discussions under section 312(c);~~

~~"(B) bids are intended to be evaluated with discussions under section 312(c), but might be evaluated without discussions under section 312(b); or~~

~~"(C) bids will be evaluated without discussions under section 312(b); and~~

~~“(4) in the case of a solicitation including a statement described in clause (3)(C), a statement specifying the time and location for the opening of bids.~~

~~“(b) Bids submitted in response to a solicitation including a statement described in subsection (a)(3)(C) shall be opened publicly at the time and place specified in the solicitation. Such bids may not be withdrawn or modified after the opening unless a mistake in the bid is established to the satisfaction of the executive agency which issued the solicitation.~~

~~“(c) Any bid submitted in response to a solicitation including a statement described in subsection (a)(3)(B) may be accepted without discussions under section 312(b).~~

~~“EVALUATION OF BIDS; AWARD~~

~~“Sec. 312. (a)(1) An executive agency issuing a solicitation shall evaluate each bid submitted in response to such solicitation based on—~~

~~“(A) the bid price; and~~

~~“(B) such other factors as the executive agency considers appropriate.~~

~~“(2) Factors which an executive agency may consider under paragraph (1)(B) include—~~

~~“(A) the total cost to the Government, including—~~

~~“(i) bid price; and~~

~~“(ii) maintenance and operating costs during the useful life of the property in the case of purchased property, or during the contract term in the case of services and leased property;~~

~~“(B) the cost of administering the contract;~~

~~“(C) technical factors; and~~

~~“(D) management factors.~~

~~“(b) Except as provided in subsection (c), the executive agency shall evaluate bids without discussions with the bidders in any case in which the Government’s needs, with respect to the property or services to be procured, and the terms and conditions of the contract are sufficiently described to permit—~~

~~“(1) sources timely to prepare and submit bids on an informed basis; and~~

~~“(2) the executive agency timely to evaluate all bids on a common basis.~~

~~“(c) An executive agency may discuss bids with bidders during the evaluation of bids whenever the executive agency determines that it is necessary to discuss the Government’s needs or the terms and conditions of the contract with bidders after receipt of bids and before the purchase or the award of the contract.~~

~~“(d) Subject to the requirements of subsections (b) and (c), the evaluation methods described in such subsections may~~

~~be used successively in any procurement in which bids are intended to be evaluated in successive steps.~~

~~"(e) All bids may be rejected when it is determined to be in the Government's best interest.~~

~~"(f) An executive agency may not, after using noncompetitive procedures, purchase or enter into a contract for property or services at a price exceeding $75,000 unless—~~

~~"(1) a notice has been published pursuant to section 313(b)(2);~~

~~"(2) all interested persons have been permitted to respond or submit bids in response to such notice within thirty days after the date of the publication of such notice;~~

~~"(3) the head of the executive agency has considered all responses submitted within thirty days after such date; and~~

~~"(4) the head of the executive agency has approved the purchase or the award of the contract.~~

~~"(g) Award shall be made by giving notice of the award to the responsible bidder whose bid conforms to the solicitation and is most advantageous to the Government on the basis of price and such other factors as the executive agency considers appropriate. Notification of such award shall be promptly made to all other bidders.~~

~~“PROCUREMENT NOTICE~~

~~“Sec. 313. (a) Except as provided in subsection (c)—~~

~~“(1) any agency intending to purchase or enter into a contract for property or services shall cause to be published by the Secretary of Commerce a notice described in subsection (b) in any case in which—~~

~~“(A) the executive agency intends to use competitive procedures and expects the price of the property or services to exceed $25,000; or~~

~~“(B) the executive agency intends to use noncompetitive procedures and expects the price of the property or services to exceed $75,000; and~~

~~“(2) any executive agency purchasing or awarding a contract for property or services at a price exceeding an amount specified by the Administrator of Federal Procurement Policy shall cause to be published by the Secretary of Commerce a notice announcing such purchase or award.~~

~~“(b)(1) Each notice required by subsection (a)(1)(A) shall—~~

~~“(A) be published as early as practicable in the procurement process; and~~

~~“(B) include a description of the property or services to be purchased or contracted for.~~

~~“(2) Each notice required by subsection (a)(1)(B) shall—~~

~~“(A) be published as early as practicable in the procurement process, but not less than thirty days before the date on which the executive agency intends to make a purchase from or award a contract to any source; and~~

~~“(B) include—~~

~~“(i) the names of the sources to be solicited;~~

~~“(ii) a description of the property or services to be purchased or contracted for;~~

~~“(iii) the estimated dollar value of the purchase or contract;~~

~~“(iv) the identity and location of the officer or employee of the executive agency who may be contacted for the purpose of obtaining a copy of the solicitation; and~~

~~“(v) a statement that any person may respond to the notice and submit bids within thirty days after the date the notice is published.~~

~~“(3) Each notice required by subsection (a)(2) shall be published promptly after the time of the purchase or the award of the contract.~~

~~“(c) The requirements of subsection (a) shall not apply to—~~

~~"(1) any classified procurement with respect to which a notice under such subsection cannot be written in a manner which avoids the disclosure of classified information;~~

~~"(2) any procurement under conditions described in clauses (2), (3), (4), or (5) of section 303(b); and~~

~~"(3) any procurement in which only foreign sources are to be solicited.~~

~~"RECORD REQUIREMENTS~~

~~"SEC. 314. (a) Each executive agency shall establish and maintain a record, by fiscal year, of the procurements in which noncompetitive procedures were used during such fiscal year.~~

~~"(b) The record established under subsection (a) shall include with respect to each procurement—~~

~~"(1) information identifying the source from whom the purchase was made or to whom the contract was awarded;~~

~~"(2) the property or services obtained by the Government under the procurement;~~

~~"(3) the total cost of the procurement;~~

~~"(4) the justification under section 303(b) for the use of noncompetitive procedures; and~~

~~“(5) the name of the officer or employee of the executive agency who approved the use of noncompetitive procedures in such procurement.~~

~~“(c) The record established under subsection (a) shall be available to any Member of Congress.”.~~

~~(b) The table of contents of such Act is amended—~~

~~(1) by striking out the item relating to section 303 and inserting in lieu thereof the following:~~

~~“Sec. 303. Competition requirements.”;~~

~~and~~

~~(2) by inserting after the item relating to section 310 the following new items:~~

~~“Sec. 311. Solicitation requirements.~~
~~“Sec. 312. Evaluation of bids; awards.~~
~~“Sec. 313. Procurement notice.~~
~~“Sec. 314. Record requirements.”.~~

~~CONFORMING AMENDMENTS~~

~~SEC. 102. (a) Title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 et seq.) is amended—~~

~~(1) in section 302 (41 U.S.C. 252)—~~

~~(A) by striking out the second sentence in subsection (b);~~

~~(B) by striking out subsections (c) and (d) and inserting in lieu thereof:~~

~~“(c) If in the opinion of the agency head bids received under competitive procedures evidence any violation of the~~

~~antitrust laws, he shall refer such bids to the Attorney General for appropriate action.”; and~~

~~(C) by redesignating subsections (e) and (f) as subsections (d) and (e), respectively;~~

~~(2) by striking out the heading of section 304 and inserting in lieu thereof the following:~~

~~“CONTRACT REQUIREMENTS”;~~

~~(3) in section 304 (41 U.S.C. 254)—~~

~~(A) by striking out “negotiated pursuant to section 302(c)” in the first sentence of subsection (a) and inserting in lieu thereof “awarded under this title”;~~

~~(B) by striking out “negotiated pursuant to section 302(c)” in the second sentence of subsection (a) and inserting in lieu thereof “awarded after using noncompetitive procedures”; and~~

~~(C) by striking out “negotiated without advertising pursuant to authority contained in this Act” in the first sentence of subsection (c) and inserting in lieu thereof “awarded after using noncompetitive procedures”;~~

~~(4) in section 307 (41 U.S.C. 257)—~~

~~(A) by striking out “Except as provided in subsection (b), and except” in the second sentence~~

~~of subsection (a) and inserting in lieu thereof "Except";~~

~~(B) by striking out subsection (b);~~

~~(C) by striking out "by paragraphs (11)–(13), or (14) of section 302(c)," in subsection (c);~~

~~(D) by redesignating subsection (c) as subsection (b); and~~

~~(E) by striking out subsection (d);~~

~~(5) by striking out "entered into pursuant to section 302(c) without advertising," in section 308 and inserting in lieu thereof "made or awarded after using noncompetitive procedures"; and~~

~~(6) by striking out "section 302(c)(15) of this title without regard to the advertising requirements of sections 302(c) and 303." in section 310 and inserting in lieu thereof "the provisions of this title relating to noncompetitive procedures.".~~

~~(b) The table of contents of such Act is amended by striking out the item relating to section 304 and inserting in lieu thereof the following:~~

~~"Sec. 304. Contract requirements.".~~

~~TITLE II—AMENDMENTS TO TITLE 10, UNITED STATES CODE~~

~~COMPETITIVE AND NONCOMPETITIVE PROCEDURES~~

~~Sec. 201. (a) Chapter 137 of title 10, United States Code, is amended—~~

~~(1) by striking out clauses (2) and (3) of section 2302 and inserting in lieu thereof the following:~~

~~"(2) 'Agency' means any department or establishment specified in section 2303(a) of this title.~~

~~"(3) 'Competitive procedures' means procedures under which the head of an agency makes a purchase or enters into a contract after providing the solicitation documents to more than one source.~~

~~"(4) 'Noncompetitive procedures' means procedures under which the head of an agency makes a purchase or enters into a contract after providing the solicitation documents to only one source.~~

~~"(5) 'Source' means any individual, firm, unincorporated association, joint venture, partnership, corporation, or any affiliate thereof, which submits, intends to submit, or is selected by the head of an agency to submit a bid for a contract.~~

~~"(6) 'Contract' means a written agreement for the procurement of goods or services, including amendments and modifications to any such agreement, entered into by the head of an agency and a source which has submitted a bid.";~~

~~(2) by striking out sections 2304 and 2305 and inserting in lieu thereof the following:~~

~~"§ 2304. Competition requirements~~

~~"(a) Except as provided in subsection (b), the head of an agency shall use competitive procedures in making purchases and contracts for property and services. In using competitive procedures, the head of an agency shall solicit bids without bias or favoritism with respect to any prospective source and in a sufficient number to ensure that effective and efficient competition for the purchase or contract is achieved.~~

~~"(b) The head of an agency may use noncompetitive procedures in making purchases and contracts for property and services only when—~~

~~"(1) the property and services needed by the Government are available from only one source and no other type of property or services will satisfy the needs of the agency;~~

~~"(2) the agency's need for the property or services is of such urgency that the Government would be seriously injured by the delay involved in using competitive procedures;~~

~~"(3) it is necessary to award the contract to a particular source in order to maintain an essential industrial capability in the United States or to achieve national industrial mobilization;~~

~~"(4) the terms of any agreement with a foreign government, or the directions of any foreign government reimbursing the agency for the cost of the~~

~~procurement of the property or services for such government, have the effect of requiring the use of noncompetitive procedures;~~

~~"(5) a statute requires that the procurement be made through another agency or a specified source; or~~

~~"(6) the disclosure of the agency's needs to more than one source would compromise the national security.~~

~~"§ 2305. Solicitation, evaluation, and award procedures; notice requirements~~

~~"(a)(1) Each solicitation for bids under this title shall include—~~

~~"(A) a description of—~~

~~"(i) all factors, including price, which the head of an agency reasonably expects to consider in evaluating bids submitted in response to the solicitation; and~~

~~"(ii) the relative importance which the agency assigns to such factors;~~

~~"(B) to the maximum extent possible, consistent with the needs of the agency, such description of the agency's objectives in procuring the property and services, or of the intended functions of the property or services, as will promote the submission of bids to furnish any of a variety of types or designs of property or~~

~~services which achieve such objectives or perform such functions;~~

~~“(C) a statement that—~~

~~“(i) bids will be evaluated with discussions under subsection (b)(3) of this section;~~

~~“(ii) bids are intended to be evaluated with discussions under subsection (b)(3) of this section, but might be evaluated without discussions under subsection (b)(2) of this section; or~~

~~“(iii) bids will be evaluated without discussions under subsection (b)(2) of this section; and~~

~~“(D) in the case of a solicitation including a statement described in clause (C)(iii) of this paragraph, a statement specifying the time and location for the opening of bids.~~

~~“(2) Bids submitted in response to a solicitation including a statement described in paragraph (1)(C)(iii) of this subsection shall be opened publicly at the time and place specified in the solicitation. Such bids may not be withdrawn or modified after the opening unless a mistake in the bid is established to the satisfaction of the head of an agency which issued the solicitation.~~

~~“(3) Any bid submitted in response to a solicitation including a statement described in paragraph (1)(C)(ii) of this~~

~~subsection may be accepted without discussions under subsection (b)(2) of this section.~~

~~"(b)(1)(A) The head of an agency issuing a solicitation shall evaluate each bid submitted in response to such solicitation based on—~~

~~"(i) the bid price; and~~

~~"(ii) such other factors as such head of an agency considers appropriate.~~

~~"(B) Factors which the head of an agency may consider under paragraph (1)(A)(ii) of this subsection include—~~

~~"(i) the total cost to the Government, including bid price and maintenance and operating costs during the useful life of the property (in the case of purchased property) or during the contract term (in the case of services and leased property);~~

~~"(ii) the cost of administering the contract;~~

~~"(iii) technical factors; and~~

~~"(iv) management factors.~~

~~"(2) Except as provided in paragraph (3) of this subsection, the head of an agency shall evaluate bids without discussions with the bidders in any case in which the Government's needs, with respect to the property or services to be procured, and the terms and conditions of the contract are sufficiently described to permit—~~

~~"(A) sources timely to prepare and submit bids on an informed basis; and~~

~~"(B) the head of an agency timely to evaluate all bids on a common basis.~~

~~"(3) The head of an agency may discuss bids with bidders during the evaluation of bids whenever such head of an agency determines that it is necessary to discuss the Government's needs or the terms and conditions of the contract with bidders after receipt of bids and before the purchase or the award of the contract.~~

~~"(4) Subject to the requirements of paragraphs (2) and (3) of this subsection, the evaluation methods described in such paragraphs of this subsection may be used successively in any procurement in which bids are intended to be evaluated in successive steps.~~

~~"(5) All bids may be rejected when it is determined to be in the Government's best interest.~~

~~"(6) The head of an agency may not, after using noncompetitive procedures, purchase or enter into a contract for property or services at a price exceeding $75,000 unless—~~

~~"(A) a notice has been published pursuant to subsection (c)(2)(B) of this section;~~

~~"(B) all interested persons have been permitted to respond or submit bids in response to such notice~~

~~within thirty days after the date of the publication of such notice;~~

~~"(C) the head of an agency has considered all responses submitted within thirty days after such date; and~~

~~"(D) the head of an agency has approved the purchase or the award of the contract.~~

~~"(7) Award shall be made by giving notice of the award to the responsible bidder whose bid conforms to the solicitation and is most advantageous to the Government on the basis of price and such other factors as the agency considers appropriate. Notification of such award shall be promptly made to all other bidders.~~

~~"(c)(1) Except as provided in paragraph (3) of this subsection—~~

~~"(A) any head of an agency intending to purchase or enter into a contract for property or services shall cause to be published by the Secretary of Commerce a notice described in paragraph (2) in any case in which—~~

~~"(i) such head of an agency intends to use competitive procedures and expects the price of the property or services to exceed $25,000; or~~

~~"(ii) such head of an agency intends to use noncompetitive procedures and expects the price of the property to exceed $75,000; and~~

~~"(B) any head of an agency purchasing or awarding a contract for property or services at a price exceeding an amount specified by the Administrator of Federal Procurement Policy shall cause to be published by the Secretary of Commerce a notice announcing such purchase or award.~~

~~"(2)(A) Each notice required by paragraph (1)(A)(i) of this subsection shall—~~

~~"(i) be published as early as practicable in the procurement process; and~~

~~"(ii) include a description of the property or services to be purchased or contracted for.~~

~~"(B) Each notice required by paragraph (1)(A)(ii) of this subsection shall—~~

~~"(i) be published as early as practicable in the procurement process, but not less than thirty days before the date on which such head of an agency intends to issue the solicitation to any source; and~~

~~"(ii) include the names of the sources to be solicited, a description of the property or services to be purchased or contracted for, the estimated dollar value of the purchase or contract, the identity and location of~~

~~the officer or employee of the agency who may be contacted for the purpose of obtaining a copy of the solicitation, and a statement that any person may respond to the notice and submits bids within thirty days after the date the notice is published.~~

~~"(C) Each notice required by paragraph (1)(B) of this subsection shall be published promptly after the time of the purchase or the award of the contract.~~

~~"(3) The requirements of paragraph (1) of this subsection shall not apply to—~~

~~"(A) any classified procurement with respect to which a notice under such paragraph cannot be written in a manner which avoids the disclosure of classified information;~~

~~"(B) any procurement under conditions described in clause (2), (3), (4), or (5) of section 2304(b); and~~

~~"(C) any procurement in which only foreign sources are to be solicited.~~

~~"(d) If the head of an agency considers that any bid received under the provisions of this chapter evidences a violation of the antitrust laws, he shall refer the bid to the Attorney General for appropriate action."; and~~

~~(3) by adding at the end thereof the following new section:~~

~~"§ 2316. Record requirements~~

~~"(a) Each head of an agency shall establish and maintain a record, by fiscal year, of the procurements in which noncompetitive procedures were used during such fiscal year.~~

~~"(b) The record established under subsection (a) of this section shall include with respect to each procurement—~~

~~"(1) information identifying the source from whom the purchase was made or to whom the contract was awarded;~~

~~"(2) the property or services obtained by the Government under the procurement;~~

~~"(3) the total cost of the procurement;~~

~~"(4) the justification under section 2304(b) of this title for the use of noncompetitive procedures; and~~

~~"(5) the name of the officer or employee of the agency who approved the use of noncompetitive procedures in such procurement.~~

~~"(c) The record established under subsection (a) of this section shall be available to any Member of Congress.".~~

~~(b) The table of sections at the beginning of such chapter is amended—~~

~~(1) by striking out the items relating to sections 2304 and 2305 and inserting in lieu thereof the following:~~

~~"2304. Competition requirements.~~
~~"2305. Solicitation, evaluation, and award procedures; notice requirements.";~~

~~and~~

~~(2) by adding at the end thereof the following new item:~~

~~"2316. Record and reporting requirements.".~~

~~CONFORMING AMENDMENTS~~

~~SEC. 202. Chapter 137 of title 10, United States Code, is amended—~~

~~(1) in section 2306—~~

~~(A) by striking out "may, in negotiating contracts under section 2304," in the second sentence of subsection (a) and inserting in lieu thereof "may";~~

~~(B) by striking out "negotiated under section 2304" in the first sentence of subsection (b) and inserting in lieu thereof "entered into using noncompetitive procedures";~~

~~(C) by striking out "section 2304 of this title," in subsection (c) and inserting in lieu thereof "this chapter"; and~~

~~(D) by adding at the end thereof the following new subsection:~~

~~"(h) Except in a case in which the Secretary of Defense determines that military requirements necessitate the specification of container sizes, no contract for the carriage of Government property in other than Government-owned cargo~~

~~containers shall require carriage of such property in cargo containers of any stated length, height, or width.";~~

~~(2) by striking out subsection (b) in section 2310 and inserting in lieu thereof the following:~~

~~"(b) Each determination or decision under section 2306(c), section 2306(g)(1), section 2307(c), or section 2313(c) of this title shall be based on a written finding by the person making the determination or decision, which finding shall set out facts and circumstances that (1) clearly indicate why the type of contract selected under section 2306(c) is likely to be less costly than any other type or that it is impracticable to obtain property or services of the kind or quality required except under such a contract, (2) support the findings required by section 2306(g)(1), (3) clearly indicate why advance payments under section 2307(c) would be in the public interest, or (4) clearly indicate why the application of section 2313(b) to a contract or subcontract with a foreign contractor or foreign subcontractor would not be in the public interest. Such a finding is final and shall be kept available in the agency for at least six years after the date of the determination or decision. A copy of the finding shall be submitted to the General Accounting Office with each contract to which it applies.";~~

~~(3) in section 2311—~~

~~(A) by striking out "(1) under clauses (11)-(16) of section 2304(a) of this title, and (2)" in the first sentence; and~~

~~(B) by striking out the second sentence; and~~

~~(4) by striking out "negotiated" in the second sentence of section 2313(b) and inserting in lieu thereof "entered into using noncompetitive procedures".~~

~~TITLE III—APPLICABILITY~~

~~SEC. 301. The amendments made by this Act shall apply with respect to purchases made and contracts entered into on or after the date sixty days after the date of the enactment of this Act.~~

That this Act may be cited as the "Competition in Contracting Act of 1982".

TITLE I—AMENDMENTS TO FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT OF 1949

COMPETITIVE AND NONCOMPETITIVE PROCEDURES

SEC. 101. (a) Title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 et seq.) is amended—

(1) by striking out section 303 (41 U.S.C. 253) and the heading of such section and inserting in lieu thereof the following:

"COMPETITION REQUIREMENTS

"SEC. 303. (a) Except as provided in subsection (d) or otherwise provided by law, executive agencies shall use competitive procedures in making contracts for property and services. Executive agencies shall use advance procurement planning and market research and shall prepare specifications in such a manner as is necessary to obtain effective competition with due regard to the nature of the property or services to be acquired. Executive agencies shall use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement action and shall specify its needs and solicit bids, proposals, or quotations in a manner designed to achieve effective competition for the contract.

"(b) Procurement regulations shall include special simplified procedures and forms for small purchases to facilitate making small purchases effciently and economically.

"(c) For other than small purchases, an executive agency, when using competitive procedures—

"(1) shall solicit sealed bids when—

"(A) there is sufficient time for the solicitation, submission, and evaluation of sealed bids;

"(B) the award will be made on the basis of price or factors other than price which may be objectively evaluated;

"(C) it is not necessary to conduct discussions with the responding sources about their bids; and

"(D) there is a reasonable expectation of receiving more than one sealed bid;

"(2) shall request competitive proposals when sealed bids are not required under clause (1) of this subsection.

"(d) An executive agency may use noncompetitive procedures only when—

"(1) the property and services needed by the Government are available from only one source and no other type of property or services will satisfy the needs of the executive agency;

"(2) the executive agency's need for the property or services is of such urgency that the Government would be seriously injured by the delay involved in using competitive procedures;

"(3) it is necessary to award the contract to a particular source or sources in order to achieve an essential industrial capability in the United States or to maintain national industrial mobilization;

"(4) the terms of any agreement with a foreign government, or the directions of any foreign government reimbursing the executive agency for the cost of

the procurement of the property or services for such government, have the effect of requiring the use of noncompetitive procedures;

"(5) a statute provides that the procurement be made through another executive agency or a specified source; or

"(6) the disclosure of the executive agency's needs to more than one source would compromise the national security.

"(e) An executive agency may not award a contract, for other than small purchases, using noncompetitive procedures unless a notice has been published pursuant to section 313(a)(1).";

(2) by adding at the end of section 309 (41 U.S.C. 259) the following new subsections:

"(b) The term 'executive agency' has the same meaning as provided in section 4(a) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(a)), except that such term does not include the departments or establishments specified in section 2303(a) of title 10, United States Code.

"(c) The term 'competitive procedures' means procedures under which an executive agency enters into a contract after soliciting sealed bids or competitive proposals from more than one source that is capable of satisfying the needs of the executive agency.

"(d) The term 'noncompetitive procedures' means procedures other than competitive procedures.

"(e) The term 'small purchase' means any purchase or contract which does not exceed $25,000 or such other amount as is established by the Administrator for Federal Procurement Policy pursuant to section 6 of the Office of Federal Procurement Policy Act (41 U.S.C. 405) or such other official as the President may designate in the absence of an Administrator. A proposed procurement shall not be divided into several procurements primarily for the purpose of using the small purchase procedures."; and

(3) by adding at the end thereof the following new sections:

"SOLICITATION REQUIREMENTS

"SEC. 311. (a)(1) Each solicitation under this title shall include specifications which—

"(A) consistent with the needs of the executive agency, permit effective competition; and

"(B) include restrictive provisions or conditions only to the extent necessary to satisfy such needs or as required by law.

"(2) For the purposes of paragraph (1), the type of specification included in any solicitation shall depend on the nature of the needs of the executive agency and the market

available to satisfy such needs. Subject to such needs, specifications may be stated in terms of—

"(A) function so that a variety of products or services may qualify;

"(B) performance, including specifications of the range of acceptable characteristics or of the minimum acceptable standards; or

"(C) design requirements.

"(b) Each solicitation for sealed bids or competitive proposals other than for small purchases shall include, in addition to the specifications described in subsection (a)—

"(1) a statement of—

"(A) all significant factors, including price, which the executive agency reasonably expects to consider in evaluating bids or competitive proposals; and

"(B) the relative importance which the executive agency assigns to such factors;

"(2) in the case of sealed bids—

"(A) a statement that sealed bids will be evaluated without discussions with the bidders; and

"(B) the time and place for the opening of the sealed bids; and

"(3) in the case of competitive proposals—

"(A) a statement that the proposals are intended to be evaluated with, and awards made after, discussions with the offerors but might be evaluated and awarded without discussions with the offerors; and

"(B) the time and place for submission of proposals.

"EVALUATION AND AWARD

SEC. 312. (a) An executive agency shall evaluate sealed bids and competitive proposals based on the factors specified in the solicitation.

"(b) All bids or proposals received in response to a solicitation may be rejected if the head of the executive agency determines that such action is in the public interest.

"(c) Sealed bids shall be opened publicly at the time and place stated in the solicitation. The executive agency shall evaluate the bids without discussions with the bidders and shall, except as provided in subsection (b), award a contract with reasonable promptness to the responsible bidder whose bid conforms to the solicitation and is most advantageous to the United States, considering the price and the other factors included in the solicitation under section 311(b)(1). The award of a contract shall be made by transmitting written notice of the award to the successful bidder.

"(d)(1) The executive agency shall evaluate competitive proposals and may award a contract—

"(A) after discussions conducted with the offerors at any time after receipt of the proposals and prior to the award of the contract; or

"(B) without discussions with the offerors beyond discussions conducted for the purpose of minor clarification.

"(2) In the case of award of a contract under paragraph (1)(A), the executive agency shall conduct, before such award, written or oral discussions with all responsible offerors who submit proposals within a competitive range, price and other evaluation factors considered.

"(3) In the case of award of a contract under paragraph (1)(B), the executive agency shall award the contract based on the proposals as received (and as clarified, if necessary, in discussions conducted for the purpose of minor clarification).

"(4) The executive agency shall, except as otherwise provided in subsection (b), award a contract to the responsible offeror whose proposal is most advantageous to the Government on the basis of price and such other factors as the executive agency includes in the solicitation under section 311(b)(1). The executive agency shall award the contract by giving notice of the award to such offeror and shall promptly notify all other offerors of the rejection of their proposals.

"*PROCUREMENT NOTICE*

"SEC. 313. (a) Except as provided in subsection (c)—

"(1) any executive agency intending to enter into a contract for property or services at a price exceeding an amount specified by the Administrator for Federal Procurement Policy or such other official as the President may designate in the absence of an Administrator (but not exceeding the maximum amount established for small purchases) shall furnish for publication by the Secretary of Commerce a notice described in subsection (b)(1); and

"(2) any executive agency awarding a contract for property or services at a price exceeding an amount specified by the Administrator for Federal Procurement Policy, or such other official as the President may designate in the absence of an Administrator, shall furnish for publication by the Secretary of Commerce a notice announcing such award.

"(b)(1) Each notice required by subsection (a)(1) shall—

"(A) be published as early as practicable in the procurement process, but not less than thirty days before the date on which the executive agency intends to award a contract to any source; and

"(B) include—

"(i) a description of the property or services to be contracted for, which description is not unnecessarily restrictive of competition;

"(ii) the identity and location of the officer or employee of the executive agency who may be contacted for the purpose of obtaining a copy of the solicitation;

"(iii) a statement that any person may submit a bid, proposal, or quotation which shall be considered by the executive agency; and

"(iv) in the case of a procurement using noncompetitive procedures, a statement of the reason justifying the use of noncompetitive procedures and the identity of the intended source.

"(2) Each notice required by subsection (a)(2) shall be published promptly after the time of the award of the contract.

"(c) The requirements of subsection (a) shall not apply to—

"(1) any classified procurement with respect to which a notice under such subsection cannot be written in a manner which avoids the disclosure of classified information; and

"(2) any procurement under conditions described in clauses (2), (3), (4), or (5) of section 303(d).

"(d) If the head of an executive agency considers that any bid received under sealed bid procedures evidences a violation of the antitrust laws, he shall refer the bid to the Attorney General for appropriate action.

"RECORD REQUIREMENTS

"SEC. 314. (a) Each executive agency shall establish and maintain for a period of five years a record, by fiscal year, of the procurements, other than small purchases, in such fiscal year in which—

"(1) noncompetitive procedures were used; and

"(2) only one bid was received after competitive procedures were used.

"(b) The record established under subsection (a) shall include, with respect to each procurement—

"(1) information identifying the source to whom the contract was awarded;

"(2) the property or services obtained by the Government under the procurement;

"(3) the total cost of the procurement;

"(4) the reason under section 303(d) for the use of noncompetitive procedures; and

"(5) the position of the officers or employees of the executive agency who required and approved the use of noncompetitive procedures in such procurement.

"(c) The information included in the record established and maintained under subsection (a) shall be transmitted to the Federal Procurement Data Center referred to in section 6(d)(5) of the Office of Federal Procurement Policy Act (41 U.S.C. 405(d)(5)).".

(b) The table of contents of such Act is amended—

(1) by striking out the item relating to section 303 and inserting in lieu thereof the following:

"Sec. 303. Competition requirements.";

and

(2) by inserting after the item relating to section 310 the following new items:

"Sec. 311. Solicitation requirements.
"Sec. 312. Evaluation of bids; awards.
"Sec. 313. Procurement notice.
"Sec. 314. Record requirements.".

COST AND PRICING DATA

SEC. 102. Section 304 of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 254) is amended by adding at the end thereof the following new subsection:

"(d)(1) A prime contractor or any subcontractor shall be required to submit cost or pricing data under the circumstances listed below, and shall be required to certify that, to the best of his knowledge and belief, the cost or pricing data he submitted was accurate, complete, and current—

"(A) prior to the award of any prime contract under this title using other than sealed bid procedures where the price is expected to exceed $500,000;

"(B) prior to the pricing of any contract change or modification for which the price adjustment is expected to exceed $500,000, or such lesser amount as may be prescribed by the head of the agency;

"(C) prior to the award of a subcontract at any tier, where the prime contractor and each higher tier subcontractor have been required to furnish such a certificate, if the price of such subcontract is expected to exceed $500,000; or

"(D) prior to the pricing of any contract change or modification to a subcontract covered by clause (C), for which the price adjustment is expected to exceed $500,000, or such lesser amount as may be prescribed by the head of the agency.

"(2) Any prime contract or change or modification thereto under which a certificate is required under paragraph (1) shall contain a provision that the price to the Government, including profit or fee, shall be adjusted to exclude any significant sums by which it may be determined by the executive agency that such price was increased because the contractor or any subcontractor required to furnish such a certificate, furnished cost or pricing data which, as of a date

agreed upon between the parties (which date shall be as close to the date of agreement on the price as is practicable), was inaccurate, incomplete, or noncurrent.

"(3) For the purpose of evaluating the accuracy, completeness, and currency of cost or pricing data required to be submitted by this subsection, any authorized representative of the head of the agency who is an employee of the United States Government shall have the right, until the expiration of three years after final payment under the contract or subcontract, to examine all books, records, documents, and other data of the contractor or subcontractor related to the proposal for the contract, the discussions conducted on the proposal under this chapter, pricing, or performance of the contract or subcontract.

"(4) The requirements of this subsection need not be applied to contracts or subcontracts where the price is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, prices set by law or regulation or, in exceptional cases where the head of the executive agency determines that the requirements of this subsection may be waived and states in writing his reasons for such determination.".

CONFORMING AMENDMENTS

SEC. 103. (a) Title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 et seq.) is amended—

(1) in section 302 (41 U.S.C. 252)—

(A) by striking out the second sentence in subsection (b);

(B) by striking out subsections (c) and (d); and

(C) by redesignating subsections (e) and (f) as subsections (c) and (d), respectively;

(2) by striking out the heading of section 304 and inserting in lieu thereof the following:

"CONTRACT REQUIREMENTS";

(3) in section 304 (41 U.S.C. 254)—

(A) by striking out "negotiated pursuant to section 302(c)" in the first sentence of subsection (a) and inserting in lieu thereof "awarded using other than sealed bid procedures";

(B) by striking out "negotiated pursuant to section 302(c)" in the second sentence of subsection (a) and inserting in lieu thereof "awarded after using other than sealed bid procedures"; and

(C) by striking out "negotiated without advertising pursuant to authority contained in this

Act" in the first sentence of subsection (c) and inserting in lieu thereof "awarded after using other than sealed bid procedures";

(4) in section 307 (41 U.S.C. 257)—

(A) by striking out "Except as provided in subsection (b), and except" in the second sentence of subsection (a) and inserting in lieu thereof "Except";

(B) by striking out subsection (b);

(C) by striking out "by paragraphs (11)–(13), or (14) of section 302(c)," in subsection (c);

(D) by redesignating subsection (c) as subsection (b); and

(E) by striking out subsection (d);

(5) by striking out "entered into pursuant to section 302(c) without advertising," in section 308 and inserting in lieu thereof "made or awarded after using other than sealed bid procedures"; and

(6) by striking out "section 302(c)(15) of this title without regard to the advertising requirements of sections 302(c) and 303." in section 310 and inserting in lieu thereof "the provisions of this title relating to other than sealed bid procedures.".

(b) The table of contents of such Act is amended by striking out the item relating to section 304 and inserting in lieu thereof the following:

"Sec. 304. Contract requirements.".

TITLE II—AMENDMENTS TO TITLE 10, UNITED STATES CODE

COMPETITIVE AND NONCOMPETITIVE PROCEDURES

SEC. 201. (a) Chapter 137 of title 10, United States Code, is amended—

(1) in section 2302—

(A) by inserting "the Secretary, any Deputy Secretary, any under Secretary, or any Assistant Secretary of Defense;" after "means" in clause (1);

(B) by striking out clauses (2) and (3) of section 2302 and inserting in lieu thereof the following:

"(2) 'Agency' means any department or establishment specified in section 2303(a) of this title.

"(3) 'Competitive procedures' means procedures under which the head of an agency enters into a contract after soliciting sealed bids or competitive proposals from more than one source that is capable of satisfying the needs of the agency.

"(4) 'Noncompetitive procedures' means procedures other than competitive procedures.

"(5) 'Small purchase' means any purchase or contract which does not exceed $25,000 or such other amount as is established by the Administrator for Federal Procurement Policy pursuant to section 6 of the Office of Federal Procurement Policy Act (41 U.S.C. 405) or such other official as the President may designate in the absence of an Administrator. A proposed procurement shall not be divided into several procurements primarily for the purpose of using small purchase procedures.";

(2) in section 2303(a)—

(A) by redesignating clauses (1), (2), (3), (4), and (5) as clauses (2), (3), (4), (5), and (6), respectively; and

(B) by inserting before clause (2) (as redesignated by subclause (A)) the following:

"(1) The Department of Defense.";

(3) by striking out sections 2304 and 2305 and inserting in lieu thereof the following:

"§ 2304. Competition requirements

"(a) Except as provided in subsection (d) or otherwise provided by law, the head of an agency shall use competitive procedures in making contracts for property and services. The head of an agency shall use advance procurement planning and market research and shall prepare specifications in

such a manner as is necessary to obtain effective competition with due regard to the nature of the property or services to be acquired. The head of an agency shall use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement action and shall specify the needs of the agency and solicit bids, proposals, or quotations in a manner designed to achieve effective competition for the contract.

"(b) Procurement regulations shall include special simplified procedures and forms for small purchases to facilitate making small purchases efficiently and economically.

"(c) For other than small purchases, the head of an agency, when using competitive procedures—

"(1) shall solicit sealed bids when—

"(A) there is sufficient time for the solicitation, submission, and evaluation of sealed bids;

"(B) the award will be made on the basis of price or factors other than price which may be objectively evaluated;

"(C) it is not necessary to conduct discussions with the responding sources about their bids; and

"(D) there is reasonable expectation of receiving more than one sealed bid;

"(2) shall request competitive proposals from responding sources when sealed bids are not required under clause (1) of this subsection.

"(d) The head of an agency may use noncompetitive procedures only when—

"(1) the property and services needed by the Government are available from only one source and no other type of property or services will satisfy the needs of the agency;

"(2) the agency's need for the property or services is of such urgency that the Government would be seriously injured by the delay involved in using competitive procedures;

"(3) it is necessary to award the contract to a particular source or sources in order to achieve an essential industrial capability in the United States or to maintain national industrial mobilization;

"(4) the terms of any agreement with a foreign government, or the directions of any foreign government reimbursing the agency for the cost of the procurement of the property or services for such government, have the effect of requiring the use of noncompetitive procedures;

"(5) a statute requires that the procurement be made through another agency or a specified source; or

"(6) the disclosure of the agency's needs to more than one source would compromise the national security.

"(e) The head of an agency may not award a contract, for other than small purchases, using noncompetitive procedures unless a notice has been published pursuant to section 2305(c)(1)(A) of this title.

"§ 2305. Solicitation, evaluation, and award procedures; notice requirements

"(a)(1)(A) Each solicitation under this title shall include specifications which—

"(i) consistent with the needs of the agency, permit effective competition; and

"(ii) include restrictive provisions or conditions only to the extent necessary to satisfy such needs or as required by law.

"(B) For the purposes of subparagraph (A) of this paragraph, the type of specification included in any solicitation shall depend on the nature of the needs of the agency and the market available to satisfy such needs. Subject to such needs, specifications may be stated in terms of—

"(i) function so that a variety of products or services may qualify;

"(ii) performance, including specifications of the range of acceptable characteristics or of the minimum acceptable standards; or

"(iii) design requirements.

"(2) Each solicitation for sealed bids or competitive proposals other than for small purchases shall include, in addition to the specifications described in paragraph (1) of this subsection—

"(A) a statement of—

"(i) all significant factors, including price, which the executive agency reasonably expects to consider in evaluating bids or competitive proposals; and

"(ii) the relative importance which the executive agency assigns to such factors;

"(B) in the case of sealed bids—

"(i) a statement that sealed bids will be evaluated without discussions with the bidders; and

"(ii) the time and place for the opening of the sealed bids; and

"(C) in the case of competitive proposals—

"(i) a statement that the proposals are intended to be evaluated with, and awards made after, discussions with the offerors but might be

evaluated and awarded without discussions with the offerors; and

"(ii) the time and place for submission of proposals.

"(b)(1) The head of an agency shall evaluate sealed bids and competitive proposals based on the factors specified in the solicitation.

"(2) All bids or proposals received in response to a solicitation may be rejected if the head of an agency determines that such action is in the public interest.

"(3) Sealed bids shall be opened publicly at the time and place stated in the solicitation. The head of an agency shall evaluate the bids without discussions with the bidders and shall, except as provided in paragraph (2) of this subsection, award a contract with reasonable promptness to the responsible bidder whose bid conforms to the solicitation and is most advantageous to the United States, considering the price and the other factors included in the solicitation under subsection (a)(2)(A) of this section. The award of a contract shall be made by transmitting written notice of the award to the successful bidder.

"(4)(A) The head of an agency shall evaluate competitive proposals and may award a contract—

"(i) after discussions conducted with the offerors at any time after receipt of the proposals and prior to the award of the contract; or

"(ii) without discussions with the offerors beyond discussions conducted for the purpose of minor clarification.

"(B) In the case of award of a contract under subparagraph (A)(i) of this paragraph, the head of an agency shall conduct, before such award, written or oral discussions with all responsible offerors who submit proposals within a competitive range, price and other evaluation factors considered.

"(C) In the case of award of a contract under subparagraph (A)(ii) of this paragraph, the head of an agency shall award the contract based on the proposals received (and as clarified, if necessary, in discussions conducted for the purpose of minor clarification).

"(D) The head of an agency shall, except as provided in paragraph (2) of this subsection, award a contract to the responsible offeror whose proposal is most advantageous to the Government on the basis of price and such other factors as the head of the agency includes in the solicitation under subsection (a)(2)(A) of this section. The head of the agency shall award the contract by giving notice of the award to such offeror and shall promptly notify all other offerors of the rejection of their proposals.

"(c)(1) Except as provided in paragraph (3) of this subsection—

"(A) any head of an agency intending to enter into a contract for property or services at a price exceeding an amount specified by the Administrator for Federal Procurement Policy or such other official as the President may designate in the absence of an Administrator (but not exceeding the maximum amount established for small purchases) shall furnish for publication by the Secretary of Commerce a notice described in paragraph (2)(A) of this subsection; and

"(B) any head of an agency awarding a contract for property or services at a price exceeding an amount specified by the Administrator for Federal Procurement Policy, or such other official as the President may designate in the absence of an Administrator, shall furnish for publication by the Secretary of Commerce a notice announcing such award.

"(2)(A) Each notice required by paragraph (1)(A) of this subsection shall—

"(i) be published as early as practicable in the procurement process, but not less than thirty days before the date on which such head of an agency intends to award a contract to any source; and

"(ii) include a description of the property or services to be contracted for (which description is not unnecessarily restrictive of competition), the identity and location of the officer or employee of the agency who may be contacted for the purpose of obtaining a copy of the solicitation, a statement that any person may submit a bid, proposal, or quotation which shall be considered by the head of an agency, and in the case of a procurement using noncompetitive procedures, a statement of the reason justifying the use of noncompetitive procedures and the identity of the intended source.

"(B) Each notice required by paragraph (1)(B) of this subsection shall be published promptly after the time of the award of the contract.

"(3) The requirements of paragraph (1) of this subsection shall not apply to—

"(A) any classified procurement with respect to which a notice under such paragraph cannot be written in a manner which avoids the disclosure of classified information; and

"(B) any procurement under conditions described in clause (2), (3), (4), or (5) of section 2304(d).

"(d) If the head of an agency considers that any bid received under sealed bid procedures evidences a violation of

the antitrust laws, he shall refer the bid to the Attorney General for appropriate action."; and

(4) by adding at the end thereof the following new section:

"§ 2316. Record requirements

"(a) Each head of an agency shall establish and maintain for a period of five years a record, by fiscal year, of the procurements, other than small purchases, in such fiscal year in which—

"(1) noncompetitive procedures were used; and

"(2) only one bid was received after competitive procedures were used.

"(b) The record established under subsection (a) of this section shall include, with respect to each procurement—

"(1) information identifying the source from whom the purchase was made or to whom the contract was awarded;

"(2) the property or services obtained by the Government under the procurement;

"(3) the total cost of the procurement;

"(4) the reason under section 2304(d) of this title for the use of noncompetitive procedures; and

"(5) the position of the officers or employees of the agency who required and approved the use of noncompetitive procedures in such procurement.

"(c) The information included in the record established and maintained under subsection (a) shall be transmitted to the Federal Procurement Data Center referred to in section 6(d)(5) of the Office of Federal Procurement Policy Act (41 U.S.C. 405(d)(5)).".

(b) The table of sections at the beginning of such chapter is amended—

(1) by striking out the items relating to sections 2304 and 2305 and inserting in lieu thereof the following:

"2304. Competition requirements.
"2305. Solicitation, evaluation, and award procedures; notice requirements.";

and

(2) by adding at the end thereof the following new item:

"2316. Record requirements.".

CONFORMING AMENDMENTS

SEC. 202. Chapter 137 of title 10, United States Code, is amended—

(1) in section 2306—

(A) by striking out "may, in negotiating contracts under section 2304," in the second sentence of subsection (a) and inserting in lieu thereof "may in awarding contracts after using other than sealed bid procedures";

(B) by striking out "negotiated under section 2304" in the first sentence of subsection (b) and inserting in lieu thereof "awarded after using other than sealed bid procedures";

(C) by striking out "section 2304 of this title," in subsection (c) and inserting in lieu thereof "this chapter";

(D) in subsection (f)—

(i) by striking out clause (1) and inserting in lieu thereof the following:

"(1) Prior to the award of any prime contract under this title after using other than sealed bid procedures where the price is expected to exceed $500,000;";

(ii) by striking out "negotiated" each place it appears in the second paragraph; and

(iii) by striking out "negotiation," in the third paragraph and inserting in lieu thereof "proposal for the contract, the discussions conducted on the proposal under this title,"; and

(E) by adding at the end thereof the following new subsection:

"(h) Except in a case in which the Secretary of Defense determines that military requirements necessitate the specifi-

cation of container sizes, no contract for the carriage of Government property in other than Government-owned cargo containers shall require carriage of such property in cargo containers of any stated length, height, or width.";

(2) by striking out subsection (b) of section 2310 and inserting in lieu thereof the following:

"(b) Each determination or decision under section 2306(c), section 2306(g)(1), section 2307(c), or section 2313(c) of this title shall be based on a written finding by the person making the determination or decision, which finding shall set out facts and circumstances that (1) clearly indicate why the type of contract selected under section 2306(c) is likely to be less costly than any other type or that it is impracticable to obtain property or services of the kind or quality required except under such a contract, (2) support the findings required by section 2306(g)(1), (3) clearly indicate why advance payments under section 2307(c) would be in the public interest, or (4) clearly indicate why the application of section 2313(b) to a contract or subcontract with a foreign contractor or foreign subcontractor would not be in the public interest. Such a finding is final and shall be kept available in the agency for at least six years after the date of the determination or decision. A copy of the finding shall be submitted to the General Accounting Office with each contract to which it applies.";

(3) by striking out section 2311 and inserting in lieu thereof the following:

"The head of an agency may delegate, subject to his direction, to any other officer or official of that agency, any power under this chapter."; and

(4) by striking out "negotiated" in the second sentence of section 2313(b) and inserting in lieu thereof "awarded after using other than sealed bid procedures".

TITLE III—ADVOCATE FOR COMPETITION; ANNUAL REPORT ON COMPETITION

DEFINITION

SEC. 301. For the purposes of this title, the term "executive agency" has the same meaning as provided in section 4(a) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(a)).

ADVOCATE FOR COMPETITION

SEC. 302. (a)(1) There is established in each executive agency an advocate for competition.

(2) Each head of an executive agency shall—

(A) designate for each executive agency one officer or employee serving in a position authorized for such executive agency on the date of enactment of this Act to serve as the advocate for competition;

(B) relieve such officer or employee of all duties and responsibilities that are inconsistent with the duties and responsibilities of the advocate for competition; and

(C) provide such officer or employee with such staff or assistance as may be necessary to carry out the duties and responsibilities of the advocate for competition.

(b)(1) The advocate for competition shall promote competition in the procurement of property and services.

(2) The advocate for competition in an executive agency shall—

(A) review the purchasing and contracting activities of the executive agency;

(B) identify and report to the head of the executive agency—

(i) opportunities to achieve competition on the basis of price and other significant factors in the purchases and contracts of the executive agency;

(ii) solicitations and proposed solicitations which include unnecessarily detailed specifications or unnecessarily restrictive statements of need which may reduce competition in the procurement activities of the executive agency; and

(iii) any other condition or action which has the effect of unnecessarily restricting competition in the procurement actions of the executive agency; and

(C) prepare and transmit to the head of the executive agency an annual report describing his activities under this section.

ANNUAL REPORT

SEC. 303. (a) Not later than September 30 of each of 1983, 1984, 1985, and 1986, each head of an executive agency shall transmit to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives an annual report including the information specified in subsection (b).

(b) Each report transmitted under subsection (a) shall include—

(1) a specific description of all actions that the head of the executive agency intends to take during the next fiscal year to—

(A) increase competition for contracts with the executive agency on the basis of price and other significant factors; and

(B) reduce the number and dollar value of contracts entered into by the executive agency after soliciting bids or proposals from, or evaluat-

ing bids or proposals with discussions with, only one source; and

(2) a summary of the activities and accomplishments of the advocates for competition of the executive agency during the fiscal year in which the report is transmitted.

TITLE IV—NOTICE REQUIREMENTS UNDER THE SMALL BUSINESS ACT

SEC. 401. Section 8(e) of the Small Business Act (72 Stat. 389; 15 U.S.C. 637(e)) is repealed.

TITLE V—APPLICABILITY

SEC. 501. The amendments made by this Act shall apply with respect to any solicitations for bids or proposals issued on or after the date one hundred and eighty days after the date of the enactment of this Act.

Presidential Executive Order 12352

Federal Procurement Reforms

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to ensure effective and efficient spending of public funds through fundamental reforms in Government procurement, it is hereby ordered as follows:

Section 1. To make procurement more effective in support of mission accomplishment, the heads of executive agencies engaged in the procurement of products and services from the private sector shall:

(a) Establish programs to reduce administrative costs and other burdens which the procurement function imposes on the Federal Government and the private sector. Each program shall take into account the need to eliminate unnecessary agency procurement regulations, paperwork, reporting requirements, solicitation provisions, contract clauses, certifications, and other administrative procedures. Private sector views on needed changes should be solicited as appropriate;

(b) Strengthen the review of programs to balance individual program needs against mission priorities and available resources;

(c) Ensure timely satisfaction of mission needs at reasonable prices by establishing criteria to improve the effectiveness of procurement systems;

(d) Establish criteria for enhancing effective competition and limiting noncompetitive actions. These criteria shall seek to improve competition by such actions as eliminating unnecessary Government specifications and simplifying those that must be retained, expanding the purchase of available commercial goods and services, and, where practical, using functionally-oriented specifications or otherwise describing Government needs so as to permit greater latitude for private sector response;

(e) Establish programs to simplify small purchases and minimize paperwork burdens imposed on the private sector, particularly small businesses;

(f) Establish administrative procedures to ensure that contractors, especially small businesses, receive timely payment;

(g) Establish clear lines of contracting authority and accountability;

(h) Establish career management programs, covering the full range of personnel management functions, that will result in a highly qualified, well managed professional procurement work force; and

(i) Designate a Procurement Executive with agency-wide responsibility to oversee development of procurement systems, evaluate system performance in accordance with approved criteria, enhance career management of the procurement work force, and certify to the agency head that procurement systems meet approved criteria.

Sec. 2. The Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration shall continue their joint efforts to consolidate their common procurement regulations into a single simplified Federal Acquisition Regulation (FAR) by the end of calendar year 1982.

Sec. 3. The Director of the Office of Personnel Management, in consultation with the heads of executive agencies, shall ensure that personnel policies and classification standards meet the needs of executive agencies for a professional procurement work force.

Sec. 4. The Director of the Office of Management and Budget, through the Office of Federal Procurement Policy as appropriate, shall work jointly with the heads of executive agencies to provide broad policy guidance and overall leadership necessary to achieve procurement reform, encompassing:

(a) Identifying desirable Government-wide procurement system criteria, such as a minimum requirements for training and appointing contracting officers;

(b) Facilitating the resolution of conflicting views among those agencies having regulatory authority with respect to Government-wide procurement regulations;

(c) Assisting executive agencies in streamlining guidance for procurement processes;

(d) Assisting in the development of criteria for procurement career management programs;

(e) Facilitating interagency coordination of common procurement reform efforts;

(f) Identifying major inconsistencies in law and policies relating to procurement which impose unnecessary burdens on the private sector and Federal procurement officials; and, following coordination with executive agencies, submitting necessary legislative initiatives for the resolution of such inconsistencies; and

(g) Reviewing agency implementation of the provisions of this Executive Order and keeping me informed of progress and accomplishments.

Ronald Reagan

The White House,
March 17, 1982

Statement of
The Associated General Contractors of America
Presented to the
Subcommittee on Federal Expenditures
Research and Rules
Committee on Governmental Affairs
United States Senate
May 13, 1982
On the Topic of
The Proposed Uniform Federal Procurement System

AGC is:

* More than 30,000 firms including 8,400 of America's leading general contracting firms responsible for the employment of 3,500,000-plus employees;
* 113 chapters nationwide:
* More than 80% of America's contract construction of commercial buildings, highways, industrial and municipal-utility facilities;
* Approximately 50% of the contract construction by American firms in more than 100 countries abroad.

The Associated General Contractors of America (AGC) and its 113 chapters nationwide are comprised of approximately 30,000 firms, including more than 8,500 of the nation's leading general contracting companies that perform more than $100 billion of construction annually. AGC's members also perform approximately 50 percent of the contract construction by American firms in more than 100 countries abroad. More than 95 percent of AGC's member firms are small businesses, as defined by the Small Business Administration's size standards for general construction contractors.

The Single Competitively Bid Contract

The federal construction procurement system, for well over 100 years, has served the nation and the taxpaying public well. It has done so primarily because of its emphasis on free and open competition with a single contract award to the lowest responsible bidder. This procedure has assured intense competition within the construction industry, and has assured that the federal construction project will be completed at the most economical cost to the taxpayer.

AGC is delighted to see that the Proposal for a Uniform Federal Procurement System seeks to maximize competition to the greatest extent possible. AGC does, however, have a genuine concern that the System may not achieve maximum competition in the construction industry and may follow previous bureaucratic attempts to remodel our industry.

Despite the historical success of the open competitive bid system with single contract award to the lowest responsible bidder in Federal Construction Procurement, we have seen throughout the years, attempts to tinker with this proven method; attempts to apply procurement techniques that may be appropriate in other, less competitive industries to construction procurement. While these so-called "innovative" methods have never proven successful in Federal construction procurement, the attempts to force their application seem never ending. The most recent of such attempts was embodied in the effort to apply the Office of Management and Budget Circular A-109, the Major Systems Acquisition Regulation, to construction procurement. The Circular provides for the use of "functional specifications" in procurement of larger projects, with the federal contract awarding agency using subjective evaluations to select one proposal among many different ones submitted as solutions to a vaguely defined procurement need. While such a practice might be workable in the procurement of major hardware systems, its application to construction procurement would place undue emphasis on, and give advantage to construction firms with developer or consortium capabilities--characteristics not generally found in the average small business construction firm. It would also do so at the expense, and perhaps complete elimination, of the open competitive bid system in federal construction procurement.

Functional specifications and possible elimination of the requirement for formal advertising as contained in the Proposed Uniform Federal Procurement System are solutions to problems which do not exist in construction procurement. Unlike the proposal's comment that less than one-tenth of procurement dollars use formal advertising and less than half were competitive, the overwhelming amount of construction procurement, and we would estimate approximately 99 percent, is formally advertised competitive bid. And, as to the proposal's objection to precise specifications, terms, and conditions, this is precisely what construcprocurement is all about since each construction project is unique and built to order.

We now explain by way of a hypothetical case what this proposed new system could entail if, it is applied to construction procurement. GSA determines a need for office space to house 400 government employees. GSA would issue a solicitation--a request for proposal--to the private sector geared around a "functional specification" seeking industry's proposed solutions to meet the need. Since the "functional specification" is to allow for maximum flexibility to permit industry to respond with its innovative concepts as proposed solutions to meet this need, the functional specification could conceivably be no more than "office space to house 400 employees in the Washington, D.C. area." Proposals received from industry could run the gamut from use of excess or surplus office space, joint use of existing federal buildings, purchase of a non-federal building, leasing of existing space, a proposal from a developer to build an office building and then lease it to GSA, a proposal from a consortium to develop a systems package building, a proposal from an A/E firm (or a number of A/E firms) to design an office building.

GSA would then have to narrow these proposed solutions down to a workable number, presumably fund their further development, and ultimately select one as the best solution and issue a contract. No further competition would exist, if in fact, any had existed to that point--unless, of course, the competitive bid procurement method was selected.

It should be readily apparent that in evaluating the proposals received, the government is not comparing like proposals, but rather is comparing a number of unlike proposals. Consequently, the evaluators' personal subjective opinions are injected into the process of comparing the proposed solutions. This system cannot assure, as does the traditional construction procurement method, the lowest cost to the government or maximum protection in the expenditure of public funds.

The proposed system much like the misapplication of OMB Circular A-109 to construction, will encourage the use of functional specifications in the procurement of federal construction. We have called to the attention of OFPP our concerns over the potential use of functional specifications, and have never been completely assured that functional specifications, and their competition-reducing results in federal construction, will not be used. AGC believes that Congress should require OFPP to specifically state that competition-reducing functional specifications will not be requried in construction procurement.

There also have been attempts through the years to experiment with multiple federal contract awards in lieu of a single contract system. Under the construction contracting system that has developed in the United States and many other countries through the years, the overall single contract for a construction project has been the perferred method. Under this system, the general contractor is responsible to the owner for completion of the entire project, and for every phase of the project, whether a particular part of the work is done by his own forces or by those of a subcontractor. Long experience has demonstrated that maximum efficiency, and lowest cost, in the construction of a project results when undivided responsibility for its execution is placed through the award of a single contract for the entire project. Yet, periodic attempts are made to experiment with a multiple contract system, which does not provide for coordination or undivided responsibility for the execution of the entire project.

AGC recommends that any revisions to the procurement statutes include a stated preference for open competition with award of a single contract to the lowest responsible bidder in construction procurement.

Reliance on the Private Sector

The practice of performing public construction work with government employees and equipment is unsound, wasteful and counter to the best interests of the taxpaying public. In contrast to the contract method, construction by government forces does not provide adequate safeguards for public expenditures because accurate and comprehensive cost records are seldom kept, and are not open to public inspection. Independent research and cost studies indicate construction by contract is less expensive and more efficient.

Historically, the Federal Government has acknowledged the problems of government agencies performing construction work with their own employees and has relied on contracting with private firms to accomplish the work.

This reliance on the private sector is clearly federal policy. It has been specifically legislatively expressed as regards construction under the Federal-Aid Highway Act (23 U.S.C. 112 (a)) and construction of the Economic Development Administration's public work projects (92 U.S.C. 6705 (e) (1)). In addition, OMB Circular A-76

(Policies for Acquiring Commercial or Industrial Products and Services Needed by the Government), which establishes the policies and procedures used to determine whether needed commercial or industrial type work should be done by contract with private sources or in-house using government facilities and personnel, states "In a democratic free enterprise economic system, the government should not compete with its citizens. The private enterprise system, characterized by individual freedom and initiatives is the primary source of national economic strength. In recognition of this principle, it has been and continues to be the general policy of the government to rely on competitive private enterprise to supply the products and services it needs," and "The government's business is not to be in business. Where private services are available, they should be looked to first to provide the commercial or industrial goods and services needed by the government to act on the public's behalf."

Although AGC is not certain that all agencies covered by OMB Circular A-76 are, in fact, adhering to the requirements of the Circular, the very existence of the Circular, at least affords the private sector the opportunity to challenge an agency determination to perform work in-house (section II (appeals) of OMB Circular A-76). The Circular, unfortunately, applies only to executive agencies that contract for commercial or industrial activities and consequently excludes from coverage the vast majority of federal expenditures for the procurement of supplies, equipment, construction and services, i.e. procurement for federal assistance programs.

We are delighted to see that both the Proposal for a Uniform Federal Procurement System and the proposed legislative amendments which will implement the system recognize that this country was founded upon the principle that private enterprise, not the federal government, should conduct business activities. We believe that this premise should be applied to those procurement activities of state and local governments utilizing federal assistance. Although the System is intended to be used by direct federal awarding agencies, we believe that this premise is of such importance that it should be applied to procurements using federal assistance funds.

The Procurement System should not be Used as a Vehicle to Implement Socio-Economic Programs

Public Law 91-129 declares it "to be the policy of Congress to promote economy, efficiency, and effectiveness" in the procurement of goods and services by the Executive Branch; and yet, that policy is thwarted every day in every procurement solicitation issued by the government by using procurement as a vehicle to implement social-economic programs and policies.

In 1969, the Commission on Government Procurement was created by Congress to study and recommend to Congress methods "to promote the economy, efficiency, and effectiveness" of procurement of the Executive Branch. The Commission, with membership from the Legislative and Executive Branches and from the public, issued its recommendations in 1972. Among them were the following:

> "It is basic government procurement policy to obtain products and services of the needed quality at the lowest reasonable price available. . . The pursuit of social and economic objectives through the procurement process often contradicts the basic policy to minimize cost. . . The problems engendered by use of the procurement process in the implementation of national goals are that procurement becomes

> more costly and time consuming with the addition of each new social and economic program. . . there are limits to the number of such objectives that the procurement process can support. . ."

AGC believes that limit has been reached, and, in fact, exceeded. That same Commission on Government Procurement, in 1972, identified 39 social and economic programs which are implemented through the federal procurement system. We can only guess that that number has probably doubled in the intervening nine years since the study was done.

The cumulative effect of the continual layering of non-procurement obligations on the procurement process has been increased costs, delays, reduced efficiency, reduced effectiveness, and the slow destruction of the open competitive bid system.

It is time for our government to make a reasonable assessment of the costs these socio-economic programs impose of the procurement process and of the results of these programs in order to determine if the procurement process is an effective and appropriate vehicle for their implementation.

AGC believes it is time that price and quality is returned to its rightful place as master of the procurement system, not as servant to a myriad of non-procurement objectives.

AGC recommends that any revisions to the procurement statutes contain severe limits on the use of the procurement system as a vehicle for implementing non-procurement objectives.

Electronic Industries Association

Peter F. McCloskey
President

June 17, 1982

The Honorable John C. Danforth
United States Senate
Washington, DC 20510

Dear Senator Danforth:

The Electronic Industries Association (EIA) is pleased to respond to your request that we comment on the recently published proposal for a Uniform Federal Procurement System (UFPS).

Federal procurement is a big business. Its budget represents about one-fifth of the total federal budget or approximately $134B. Thousands of government employees in every agency of government engage in over 18 million procurement actions a year.

EIA member companies engage in a significant number of procurement actions with government agencies each year. We are keenly aware of the myriad regulations, laws, and policy that encumber what should otherwise be a simple process. Over the years, EIA has actively participated in a number of studies on how to improve the federal procurement process. In 1969, EIA supported the creation of the Commission on Government Procurement and worked with the Commission during its two year study of federal procurement. We supported many of the recommendations of the Commission, including the one that led to the creation of the Office of Federal Procurement Policy (OFPP).

EIA has worked with OFPP in exploring ways to improve federal procurement procedures. For the past two years, OFPP has made the development of a comprehensive, integrated Uniform Federal Procurement System its primary objective and has devoted most of its time and efforts into producing the UFPS proposal submitted to the Congress on February 26, 1982.

Everyone involved in the federal procurement process, whether with the government or industry, recognized that improvements are needed; and EIA believes that the proposed UFPS is a significant step toward achieving economy, efficiency and effectiveness in the federal procurement process.

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We note that the present legislative proposal requires the amendment of the two existing procurement statutes, i.e., the Armed Services Procurement Act of 1947 and the Federal Property and Administrative Services Act of 1949. While EIA prefers the enactment of a single statute with sufficient flexibility to accommodate unique mission requirements of the various government agencies, appropriate modification of the two statutes could provide a satisfactory solution.

The President, on March 17, 1982, signed Executive Order 12352, entitled Federal Procurement Reforms, which directs the implementation of much of the proposed UFPS, including establishing a date for completion of the long awaited Federal Acquisition Regulation. Based on our experience with the Armed Services Procurement Regulation (ASPR), the "shake-down" period during which the FAR is implemented can be considerably shortened with the OFPP acting as the clearinghouse for all government procurement policy matters. We believe that the government can do no less than provide a centrally managed source for government-wide procurement policies and regulations. This way, we may avoid some of the trials and tribulations that accompanied the introduction and implementation of the ASPR.

We have come to a crucial point in our 13-year effort to reform the federal procurement process; it is too important an issue to delay any longer. EIA, as in the past, will continue to play a supportive role in the development and implementation of legislative and administrative actions to modernize and improve the federal procurement process.

Sincerely,

Pete McCloskey

cc: Senate Committee On
Governmental Affairs

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May 18, 1982

The Honorable John C. Danforth
Chairman, Subcommittee on Federal
Expenditures, Research, and Rules
Senate Committee on Governmental Affairs
44 Capitol Hill Apartments
Washington, D.C. 20510

Dear Mr. Chairman:

Proposed Uniform Federal
Procurement System

In connection with the current subcommittee hearings, we wish to present the views of the Machinery and Allied Products Institute (MAPI) on the uniform Federal Procurement System (FPS) proposal which was submitted to the Congress on February 26.

The Institute represents the capital goods and allied product industries of the United States. Although the bulk of the companies in these industries sell primarily to the commercial rather than the government market, many of them supply products which are essential to the government, particularly in the national defense area. And these companies have a deep and continuing interest in the procurement system, including the policies and regulations, used by the federal government in connection with its purchases from private industry.

As you may recall, in a letter dated April 23, 1981, we communicated our views to the subcommittee on problems concerning the Federal Procurement System. Our reaction to the proposal now formulated by the Office of Federal Procurement Policy (OFPP) reflects our views as to the extent to which the FPS proposal deals effectively with the problems cited in our earlier letter. Our comments also note the earlier draft of the FPS proposal, with respect to which we responded to the OFPP Administrator in a letter dated November 24, 1981. Thus it is from both perspectives--our view of what the problems are and the earlier draft of the FPS proposal--that our comments on the FPS proposal as submitted to the Congress are based.

MACHINERY & ALLIED PRODUCTS INSTITUTE AND ITS AFFILIATED ORGANIZATION, COUNCIL FOR TECHNOLOGICAL ADVANCEMENT, ARE ENGAGED IN RESEARCH IN THE ECONOMICS OF CAPITAL GOODS (THE FACILITIES OF PRODUCTION, DISTRIBUTION, TRANSPORTATION, COMMUNICATION AND COMMERCE) IN ADVANCING THE TECHNOLOGY AND FURTHERING THE ECONOMIC PROGRESS OF THE UNITED STATES

General Reaction

At the outset, we want to make it clear that, in general terms, we favor the concept of a uniform Federal Procurement System and also a significant role within that system for the Office of Federal Procurement Policy.

However, with respect to the text of the proposal, we are concerned with the fact that a number of issues which we think are important and were discussed in our April 23, 1981 letter to the subcommittee, have either not been dealt with or have been given inadequate treatment.

We recognize that the FPS proposal indicates, on page 4, that it is intended to be "system oriented" rather than "issue oriented," in the following language:

> The 1980 proposal was issue oriented rather than system oriented. The current proposal focuses on the procurement and management system components (e.g., processes, controls, regulations, work force, management structures, authorities, responsibilities and accountability) and not on the myriad procurement issues.

Presumably as a consequence, a number of important issues will remain to be resolved by the system rather than in connection with establishing the system itself. Further, we concede that an attempt to resolve all these issues at this time might endanger the attainment of the primary objective at this point, the establishment of the system. Under these circumstances, we understand why a number of what we regard as key issues are not covered in the proposal and we support the proposal with the assumption that the system to be established will deal with these issues in due course.

However, we are concerned by the omission in the proposal of the following sentence included in the earlier draft: "Once established, the system will resolve the issues." Why this reassurance that other problems will be dealt with later has been omitted, is not clear. Its omission causes us concern that it is no longer intended that the system will deal with such problems, and this concern is not allayed by the listing of such problems in Appendix C of the proposal.

Socioeconomic Requirements

In our view, the most important substantive change in the FPS proposal as compared with the earlier draft version, is the "watering down" of the coverage with respect to socioeconomic requirements in government contracts. To repeat briefly from our April 23, 1981 letter to the subcommittee, we characterized this problem as follows:

> For many years now, through both legislation and administrative action, companies have been required, simply because they have entered into government

> contracts or subcontracts, to comply with various socioeconomic requirements the objectives of which have no direct relationship to the furnishing of goods and services to the government. As you know, these requirements range over a broad spectrum, including the provision of safe and healthful working conditions, the payment of fair wages, employment nondiscrimination and affirmative action (for minorities, the handicapped, Vietnam veterans, and other groups), and subcontracting to small business and "disadvantaged" small business (in accordance with Public Law 95-507). These requirements have become increasingly burdensome in terms of quality of contract performance, costs, paperwork, and time. A lightening of this burden clearly warrants high-priority attention by Congress.

In the FPS draft, it was acknowledged that socioeconomic requirements--even though their intent and objectives, in at least some cases, may be desirable as a matter of public policy--should not be imposed on government contractors as a condition of their doing business with the government. Further, the draft provided that such requirements be completely eliminated in the case of small purchases and purchases of commercial products and services.

The comparable language in the proposal has been modified to read simply as follows:

> The proposed system will eliminate as many as possible of the unnecessary provisions from small purchases and return this category of procurement to the level of simplicity originally intended./1

Thus there may be some relief for small purchases but the extent of such relief is no longer certain. Most likely, certain unspecified requirements would continue to apply to small purchases. Further, the commitment in the draft to relief from these requirements for commercial purchases is now entirely missing. We think that this "retreat" with respect to socioeconomic requirements is a most serious matter, which should be reversed if the FPS is seriously intended to be an effort to reform and simplify government contracting.

Public Participation in the Development of Procurement Rules and Regulations

On this matter, we commented as follows in our April 23, 1981 letter to the subcommittee:

1/ P. 33.

Although the procurement process has been exempted from the requirements of the Administrative Procedure Act relating to proposed rulemaking, there appears to be general agreement that the comments and recommendations of interested nongovernment groups on proposed policies and rules can be helpful and that such participation by outside groups is desirable. In addition, we believe, along with many others both inside and outside government, that such participation can be effective only when (1) sought before the policy or rule has not been finally decided upon and is still under consideration, (2) the background of and reasons for the policy or rule are disclosed, and (3) sufficient time is afforded to the outside groups to furnish such comments.

These conditions to the effectiveness of outside group participation appear to be generally recognized in pertinent provisions (e.g., Section 1.501) of the draft Federal Acquisition Regulation (FAR) now in preparation under the direction of OFPP. But the Defense Department (DOD), in the administration of its Defense Acquisition Regulation (DAR), does not appear to follow the first and second conditions we have noted. Indeed, the Institute which is normally requested to furnish comments on DAR, has repeatedly called to DOD's attention that DAR proposals are invariably submitted for comment without a statement of the background of and reasons for the change. Although DOD officials have indicated that they understand the problems and intend to take some corrective action, we have been unable to detect any improvements thus far despite these reassurances.

In the earlier draft, we were pleased to note that Section 304, "Procurement Regulations," of the proposed "Federal Procurement System Act of 198_," dealt with this problem. Subparagraph (b)(1) of that provision covered the participation of the public in the development of regulations in the following language:

> (b) The Administrator shall establish criteria and procedures to ensure an effective and timely method of soliciting the viewpoints of interested parties in the development of procurement regulations which shall include, at a minimum --
>
> > (1) publication of notice of proposed regulations in the Federal Register, including the proposed language, background, and reasons for the proposed regulations; . . .

In the proposed legislative amendments submitted on April 30, 1982 to accompany the proposal, the OFPP Administrator would be required to "[establish] procedures to ensure an effective and timely method of soliciting the viewpoints of interested parties in the development of procurement policies and regulations."/1 But the examples of what constitute the criteria and procedures to ensure effective and timely methods of soliciting the viewpoints of interested parties, included in the draft, have been deleted.

This, again, is a most serious omission; our experience with DOD, cited above, indicates the need for specificity as to "[ensuring] an effective . . . method of soliciting the viewpoints of interested parties . . . ."

Other Comments

These relate to matters with respect to which we support the language of the proposal.

Commercial Practices for Commercial Products

The statement in the proposal that the FPS "will be based on a statutory preference for use of functional specifications and procurement of commercial products or services,"/2 we think is highly desirable, and we commend OFPP for its inclusion.

Removing Limitations on Contractor Profit or Fee

MAPI supports the statement on this subject at page 36 of the proposal, particularly that there should be no statutory limitation on contractor profit or fee other than in wartime or under emergency conditions.

We recognize that some may contend it would be desirable to include a comprehensive profit policy statement as a part of the FPS. On balance, it seems to us better not to do this; some flexibility with regard to developing and refining a comprehensive profit policy in the light of experience is desirable and that can be more readily achieved through inclusion in regulations rather than as a part of the system.

1/ Proposal for a Uniform Federal Procurement System, Supplementary Volume No. 1, p. A-6.

2/ P. 31.

Methods of Procurement

One of the fundamental reforms included in the proposal, at page 47, would establish a new method of procurement, called "bidding with discussion," which would be used, together with "bidding without discussion," to obtain competition. As we understand it, "bidding with discussion" would generally encompass what is now referred to as competitive negotiation. We support this concept. Its adoption would serve to eliminate much of the current misunderstanding that all negotiated procurement, since it is awarded without "formal advertising" and competitive bidding, is in fact noncompetitive.

Moreover, since these provisions are quite different from the provisions of current law in this respect, we can see no objection to their first being tested. Indeed, we think that such testing before their adoption in final form might be a particularly good idea.

* * *

This concludes our comments on the proposed uniform Federal Procurement System. If we can be of further assistance in this matter, please let us know.

Respectfully,

Charles Stewart
President

mfm

NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS

STATEMENT OF

John H. Fitch, Jr.

Vice President - Government Relations

National Association of
Wholesaler-Distributors

BEFORE THE

Subcommittee on
Federal Expenditures, Research and Rules

Committee on Governmental Affairs

United States Senate

ON

Uniform Federal Procurement System
(A Draft Proposal)

May 13, 1982

1725 K Street, N.W. • Washington, D.C. 20006 • 202/872-0885

FULL STATEMENT

Mr. Chairman, on behalf of NAW and the wholesale distribution industry, I appreciate the opportunity to submit our views on OFPP's draft proposal for a Uniform Federal Procurement System. I would like to point out that NAW is a member of the Coalition for Common Sense in Government Procurement and strongly associate ourselves with their comments presented here this morning.

NAW

The National Association of Wholesaler-Distributors is a federation of 121 national wholesale distribution associations (see Appendix I) which have an aggregate membership of approximately 45,000 wholesaler-distributors, with 125,000 places of business. The members of our constituent associations are responsible for 60% of the $1.4 trillion of merchandise which will flow through wholesale channels this year according to the Commerce Department. They employ a comparable percentage, or 3.3 million of the 5.5 million Americans who work in wholesale trade. Thus, although the individual firms which our organization represents are small- to medium-sized businesses individually, their collective economic importance is most significant.

THE INDUSTRY

The wholesale distribution industry, in contrast to the manufacturing sector of the economy, continues to be dominated by small- to medium-sized, closely-held, family-owned businesses. Of the 238,000 merchant wholesaler-distributor corporations filing tax returns in 1977, 99% had assets of $10 million or less. These smaller firms accounted for about 58% of the industry's sales volume. In contrast, in the manufacturing sector, approximately 2% of the firms controlled about 88% of the assets and accounted for approximately 80% of sales.

The wholesale distribution industry provides year-round employment for over 5 million individuals. In 1977, average hourly earnings ($6.78) in wholesale trade exceeded those for all private industry ($5.14), while average weekly earnings ($212) were 15% above those in private industry ($185). In short, the wholesale distribution industry provides dependable, well-paying jobs throughout the U.S. economy.

Industry sales totaled approximately $1 trillion in 1981 and are expected to reach $1.4 trillion in 1982, according to United States Commerce Department estimates (see Appendix II).

A 1981 profile of the wholesale trade, as compiled by the U.S. Department of Commerce from Census Bureau figures, shows the following:

SIC CODES: 50-51

Sales (million $)	1,218,384
Employment (000)	5,412
Number of establishments (1977)	307,264
Compound annual rate of change, 1972-81:	
Sales (percent)	14.7
Employment (percent)	3.0

Merchant wholesaler-distributors perform an essential economic function. They make goods and commodities of every description available at the place of need, at the time of need. Wholesaler-distributors purchase goods from producers, inventory these goods, break bulk, sell, deliver, and extend credit to retailers and industrial, commercial, institutional, governmental and contractor business users.

Wholesaler-distributors are essential to the efficient satisfaction of consumer and business needs. Further, by the market coverage which they offer smaller suppliers and the support which they provide to their customers, wholesaler-distributors preserve and enhance competition, the critical safeguard of our economic system. According to an NAW survey, the typical wholesaler-distributor establishes the market connection between 133 manufacturers and 533 business customers. Many of these manufacturers are themselves small businessmen who must rely on wholesaler-distributors to establish, maintain, and nurture markets for their products.

The majority of customers are small businessmen, also, who look to the merchant wholesaler-distributor to provide merchandise availability, credit and other critical services.

Strongly committed to a simplified, responsive, cohesive and efficient federal procurement system, NAW applauds the efforts of OFPP and the Subcommittee for undertaking this extremely difficult and tedious task. Working with the business community, the fruits of this labor should transform the federal government into a responsible and accountable customer, subject to the same rules and rigors of the economic arena as are all businesses.

Competitiveness, efficiency and responsiveness are all characteristics of a healthy and thriving business. NAW believes that a uniform federal procurement system along the lines proposed by OFPP in its draft go a long way toward achieving that goal for the federal government.

It is with that in mind that I offer the following comments on OFPP's draft proposal for a Uniform Federal Procurement System.

During 1981, the wholesale distribution industry was responsible for approximately $10 billion worth of goods and products purchased by the federal government. In addition, we estimate that $5 to $7 billion more of goods and products were sold to federal grantees paid for by federal funds. According to

OFPP's own statistics, the wholesale distribution industry accounts for 24% of government's direct or indirect private sector purchases. Therefore, the wholesale distribution industry has a significant stake in the development of a simplified and responsive Uniform Federal Procurement System. Moreover, the amounts mentioned above would be significantly increased if the federal government were to become an efficient and responsive customer or business service.

SIMPLIFICATION OF THE FEDERAL PROCUREMENT SYSTEM

Multi-Year Contracting

NAW strongly supports OFPP's proposal for greater use of multi-year contracts. There is no question that multi-year contracts enhance competition, reduce procurement costs, and greatly reduce the paperwork burden on both the government and contractors. Particularly, multi-year contracts are most efficient on federally-funded construction projects or/and contracts which require the availability of spare parts for equipment for long-lived government-owned assets.

Expressing Government Needs in Terms of Function

The current use of government design specifications greatly complicates the procurement system. Moreover, it restricts competition and fails to take advantage of existing products. Finally, in many instances, specifically designed government specifications eliminate the wholesaler-distributor from the process. That is, distribution of such items is made directly from the manufacturer to the government rather than through local or regional wholesaler-distributors, thus increasing the costs. If government needs were expressed in terms of function, in most instances the goods or products required to fulfill those needs are readily available in the private sector. This availability obviously reduces the cost of the item to the government and fulfills the contracting-out policy of the Office of Federal Procurement Policy. It also gives federal agency contract and procurement officers greater flexibility in purchasing goods and products.

Simplifying Government Solicitations and Contracts

With well over 25 federal agencies involved in the government procurement process, each with its own rules and procedures, a single uniform government standardized format for solicitation and contract documents definitely is needed. The development of such a system will enable contracting officers, negotiators, contractors, and even prospective contractors to look in the same section of every solicitation or contract to find the statement of terms, the applicable clauses for delivery, payment schedule, and other key information. This standardization will go a long way toward simplifying the unnecessarily complex procurement system we have today.

Commercial Practices for Commercial Products

As stated previously, the government needs to be able to take advantage of what is currently available in the marketplace to satisfy its needs. The proposal developed by OFPP is based on a statutory preference of procurement for commercial products and the use of commercial distribution channels. With such a clear preference, a contracting officer can determine what the marketplace offers and can have the flexibility to obtain effective competition. NAW believes this will greatly reduce the costs of procurement and will stimulate local economies by giving procurement officers the flexibility to buy commercially available goods and products immediately. In this regard, I might add that NAW is strongly advocating an increase in the Federal Supply Schedule national and regional thresholds. This would also greatly enhance the local procurement officer's ability to purchase goods which are readily available off the local economy.

Removing Limitations on Contractor/Profitor Fee

The current statutory limits on the profitor fee that a contractor may earn are contrary to America's free enterprise/ free market system. They are not compatible with a simplified competitive system, nor with the very concept of competition. NAW strongly urges OFPP to eliminate this statutory limitation on contractor profit except under certain emergency conditions. We strongly believe that techniques of negotiation, use of cost and price analysis, contract audit, plus the Truth in Negotiation Act, are adequate safeguards against paying excessive prices under normal conditions.

Reducing Burdensome Contract Provisions

Because of the hundreds of statutorially required clauses and specifications that must be made part of the Federal contract, many private sector or potential private sector contractors elect not to participate in the process. However, those that do, pass on the cost of compliance with these requirements to the government.

In aggregate, these burdensome and unnecessary contract provisions inhibit competition and have a tremendous impact on the cost of these contracts to the government.

Many of these provisions relate to the achievement of certain socioeconomic objectives. NAW strongly believes that there are more effective ways to achieve these objectives than by tying them specifically to the procurement process. Government contracts should not become complicated by, or used as a vehicle for, enforcement mechanisms for such laws or national policy. With laws such as the Fair Labor Standards Act, the Equal Employment Opportunity Act, and others, there's ample relief for enforcement of the federal government's socioeconomic objectives.

At a minimum, the proposed system of OFPP would eliminate socioeconomic requirements for small purchases and purchases of commercial products or services. In their draft proposal, OFPP sets $25,000 as a threshold for any special socioeconomic program requirement. Since small purchases are reserved by law for small businesses, it will particularly benefit smaller concerns such as wholesaler-distributors.

Improving Contract Administration

NAW strongly agrees with OFPP that a number of improvements can be made in how the government administers its contracts. For example: (1) unifying all contract administration activities at a particular contractor's site under one agency; (2) issuing uniform cost principles for government-wide use; (3) speeding up payments to contractors; and (4) paying only for performance received.

Out of this entire group, speeding up of payments to contractors is probably of greatest interest to NAW. During periods of financial stress, delays by the federal government paying for goods or products received greatly disrupt normal cash flow of the wholesaler-distributor and seriously impact a contractor's costs and financial stability--particularly small businesses. Statistics show that fully 60% of government contracts are not timely paid. In dollars, that amounts to $84 billion.

Late payment by the government has two significant impacts: (1) it discourages private sector firms from doing business with the government; and (2) it greatly inhibits competition and increases costs to the federal government.

As a member of the Slow Pay Coalition, NAW has been active in seeking legislation that would require the government to pay its bills on time or pay interest on the overdue accounts. This kind of policy not only brings the federal government into line with normal business practices, but makes each agency more responsible and accountable for its actions. This is particularly true when interest payments for overdue accounts must come from existing appropriations.

In this regard, NAW would like to extend its appreciation to you, Mr. Chairman, and the other members of the Subcommittee for your collective effort to enact such a bill. As you know, it is on the President's desk and should be signed soon.

Simplifying Small Purchases

As stated previously, there is tremendous need to simplify the procedures for small purchases. This can be done in a number of ways: (1) by raising the Federal Supply Schedule national and regional thresholds to give local purchasing agents more flexibility in purchasing goods locally "off the economy"; (2) by raising the small purchase ceiling to $25,000, with flexibility for future adjustments; (3) by removing unnecessary socioeconomic requirements from small purchase contracts; (4) by authorizing faster pay for small purchases--for example, allowing use of cash payment purchase orders; increasing use of imprest funds; limiting the requirement for receiving reports before payments; and relying on the vendor's invoice in the case of all purchases.

INCREASING COMPETITION IN THE FEDERAL PROCUREMENT PROCESS

New Standards for Competition

As I stated in the previous section on simplification, there are many roadblocks and inhibiting factors relating to competition for the government procurement dollar by the private sector. The OFPP draft proposal has identified several such standards that NAW strongly supports:

(1) The solicitation will incorporate a clear and accurate description of the need or requirement to be satisfied. It will not contain features, designs or manufacturing processes which unduly restrict competition. Functionally stated performance requirements will be used to the maximum extent.

(2) Bids will be solicited from a sufficient number of prospective sources to ensure effective competition. All potential sources need not be solicited for every procurement. Rotation of source lists may be used when lists of potential sources are unreasonably long. The number solicited will depend on what is available in the marketplace and the dollar value of procurement.

(3) If price competition exists, government officials will not ask for price reductions from prospective contractors unless there is a material change in the scope of work or terms and conditions.

New Types of Competition

OFPP, in its draft proposal has identified three types of competition: price competition; lowest total cost; and multiple factors.

NAW strongly objects to competition based on price to the government without consideration of total ownership cost. NAW also objects to competition based on total costs of the Government which include purchase price, maintenance, and outgoing costs over the useful life of the property or service because this type of competition fails to include the cost of warehousing, breaking bulk, repackaging and delivering. For a wholesaler-distributor, these costs are an integral part of his price.

However, NAW strongly supports competition based on a range of factors such as technical and management ability, performance capability, price, lowest total cost, service and delivery. This type of competition considers the quantitative and qualitative value of the property or goods to the Government. Procedures and evaluation factors for competition would be tailored to the objective dollar value of competition rather than a subjective price factor. NAW believes this most accurately reflects the actual cost to the government, based on realistic estimate of the contractor.

CONCLUSION

NAW strongly believes that whenever the federal government enters the marketplace as a buyer, it should abide by the rules of the marketplace with regard to the commodities involved. Specifically, this means that the federal government should tend to its needs in the most efficient, responsive and cost-effective way possible. That is not the case now.

The government procurement system is needlessly complex, unnecessarily costly, inefficient, wasteful and generally a poor customer. As a result, it caters to the contractors possessing those same characteristics.

NAW, on behalf of the wholesale distribution industry, strongly agrees that it is time that the government be bound by the normal rules of business and commerce. In the current economic environment with the imposition of budgetary efficiencies, an horrendously out-of-sync system such as the current Federal procurement system is an anathema and, hopefully, an anachronism. NAW strongly believes that the draft proposal of the Uniform Federal Procurement System, as proposed by the Office of Federal Procurement Policy, will simplify and reform the federal procurement system and make it a more efficient, responsive and responsible customer. We applaud the efforts of OFPP in this regard and the efforts of this Subcommittee as well as those members of the Coalition for

Common Sense in Government Procurement and other private sector individuals who have come together to undertake this Herculean task.

NAW would also like to commend the President for his efforts to achieve these goals by the issuance of his Executive Order on Federal Procurement Reforms.

I thank the Subcommittee for the Opportunity to submit these views.

APPENDIX I

National Wholesaler-Distributor Organizations Affiliated with the National Association of Wholesaler-Distributors

Air-conditioning & Refrigeration Wholesalers
American Dental Trade Association
American Jewelry Distributors Association
American Machine Tool Distributors' Association
American Supply Association
American Surgical Trade Association
American Traffic Services Association
American Veterinary Distributors Association
Appliance Parts Distributors Association, Inc.
Associated Equipment Distributors
Association of Footwear Distributors
Association of Steel Distributors
Automotive Service Industry Association
Aviation Distributors & Manufacturers Association

Bearing Specialists Association
Beauty & Barber Supply Institute, Inc.
Bicycle Wholesale Distributors Association, Inc.
Biscuit & Cracker Distributors Association

Ceramic Tile Distributors Association
Ceramics Distributors of America
Cooperative Food Distributors of America
Copper & Brass Servicenter Association
Council for Periodical Distributors Association
Council of Wholesale-Distributors
  American Institute of Kitchen Dealers

Distributors Council, Inc.
Door & Hardware Institute
Drug Wholesalers Association

Electrical-Electronics Materials Distributors Assn.
Explosive Distributors Association, Inc.

Farm Equipment Wholesalers Association
Flat Glass Marketing Association
Fluid Power Distributors Association, Inc.
Food Industries Suppliers Association
Foodservice Equipment Distributors Association
Foodservice Organization of Distributors

General Merchandise Distributors Council

Hobby Industry Association

International Ceramic Association
The Irrigation Association
Institutional & Service Textile Distributors Association, Inc.

Laundry & Cleaners Allied Trades Association

Machinery Dealers National Association
Mass Merchandising Distributors Association
Material Handling Equipment Distribution Association
Monument Builders of North America-Wholesale Div.
Motorcycle Industry Council
Music Distributors Association

National-American Wholesale Grocers' Association
National Appliance Parts Suppliers Association
National Association of Aluminum Distributors
National Association of Brick Distributors
National Association of Chemical Distributors
National Association of Container Distributors
National Association of Decorative Fabric Distributors
National Association of Electrical Distributors
National Association of Fire Equipment Distributors
National Association of Floor Covering Distributors
National Association of Manufacturing Opticians
National Association of Marine Services, Inc.
National Association of Meat Purveyors
National Association of Plastics Distributors
National Association of Recording Merchandisers, Inc.
National Association of Service Merchandising
National Association of Sporting Goods Wholesalers
National Association of Textile & Apparel Distributors
National Association of Tobacco Distributors
National Association of Writing Instrument Distributors
National Beer Wholesalers Association
National Building Material Distributors Association
National Business Forms Association
National Candy Wholesalers Association
National Commercial Refrigeration Sales Association
National Electronic Distributors Association
National Fastener Distributors Association
National Food Distributors Association
National Frozen Food Association
National Independent Bank Equipment Suppliers Assn.
National Industrial Belting Association
National Industrial Glove Distributors Association
National Lawn & Garden Distributors Association
National Locksmiths' Suppliers Association
National Marine Distributors Association
National Paint Distributors, Inc.
National Paper Trade Association, Inc.
National Plastercraft Association
National Sash & Door Jobbers Association
National School Supply & Equipment Association
National & Southern Industrial Distributors Associations
National Spa and Pool Institute
National Truck Equipment Association
National Welding Supply Association
National Wheel & Rim Association
National Wholesale Druggists' Association
National Wholesale Furniture Association
National Wholesale Hardware Association
Northamerican Heating & Airconditioning Wholesalers
North American Wholesale Lumber Association, Inc.

Optical Laboratories Association

Pet Industry Distributors Association
Petroleum Equipment Institute
Power Transmission Distributors Association, Inc.

Safety Equipment Distributors Association, Inc.
Scaffold Industry Association
Shoe Service Institute of America
Specialty Tools & Fasteners Distributors Association
Steel Service Center Institute

Toy Wholesalers' Association of America

United Pesticide Formulators & Distributors Association

Wallcovering Distributors Association
Warehouse Distributors Association for
  Leisure & Mobile Products
Watch Materials & Jewelry Distributors Association
Water and Sewer Distributors Association
Wholesale Florists & Florist Suppliers of America
Wholesale Stationers' Association
Wine & Spirits Wholesalers of America, Inc.
Wood Heating Alliance
Woodworking Machinery Distributors Association

APPENDIX II

1982 U.S. Industrial Outlook

U.S. DEPARTMENT OF COMMERCE/Bureau of Industrial Economics

Wholesale Trade

Merchant wholesalers (SIC 50 & 51) should register sales growth (measured in current dollars) of 13 percent in 1982, with nondurable commodity lines barely edging out durables. Inflation and high interest rates are depressing real sales growth and maintaining pressure on operating costs. Wholesalers stand to gain real benefits from the new Economic Recovery Tax Act.

The wholesale industry has three categories—merchant wholesalers; manufacturers' sales branches and offices; and agents, brokers, and commission merchants. Of the three, merchant wholesalers account for the largest share of sales, employment, and number of firms and establishments.

Current Situation

Total sales of wholesalers grew nearly 17 percent (in current dollars) in 1981, compared with a 14 percent gain in 1980, but profit margins weakened. Slow business in 1981 hampered growth in some commodity lines of wholesaling, and a few exceeded expectations. Especially hit were lumber and other construction materials. Victim of the housing doldrums, sales of these materials edged up only 4.3 percent. Electrical goods, and machinery, equipment, and supplies did reasonably well, both posting sales gains of 16 percent—higher than the annual rate of inflation. Sales of soft goods lines, including drugs, groceries, apparel, paper, alcoholic beverages, and petroleum, advanced 19 percent above the 1980 level. More than half of this gain resulted from increased prices and from the distorting effect of the sales upsurge of petroleum distributors. Among individual lines, sales results (current dollars) varied, ranging from 9.0 percent in beer, wine, and distilled alcoholic beverages, to 40.0 percent in petroleum and petroleum products.

The sales record of petroleum wholesalers in recent years is extraordinary. Sales in 1978 increased 12.4 percent above those of 1977, sales in 1979 soared to 54.1 percent above 1978, and in 1980, they leaped again—53.5 percent above 1979. In 1981, however, the rise in sales over 1980's record tapered to 40 percent.

The two reasons for this unprecedented growth are a change in refineries' methods of distribution, and gasoline price escalation.

Before 1972, refineries channeled their products through company-controlled distribution systems. Since then, in order to reduce operating costs, refineries have turned increasingly to independent distributors to move gasoline and related products to retail outlets. Today, more than half the total volume of these products is distributed through independent wholesalers. In 1981, these independent petroleum distrbutors accounted for more than one-sixth of total sales of all merchant wholesalers and between one-fourth and one-third of total sales of soft goods wholesalers.

Wholesale Role Enlarging

Merchant wholesalers purchase, sort, assemble, grade, and store goods in large quantities. They also extend credit and resell these goods to retailers and to professional, commercial, farm, governmental, and institutional users. These functions distinguish merchant wholesaling from other types of wholesale distribution. Merchant wholesalers also establish and promote the growth of markets for their manufacturing suppliers' products and provide delivery, label designing, and advertising and other promotional services for their clients. These suppliers and clients include many small businesses who rely on wholesalers for support and services.

Merchant wholesalers are playing an increasing role in the Nation's distribution system. Of the wholesale industry's $1.3 trillion sales, according to the *1977 Census of Wholesale Trade*, merchant wholesalers' share was 53.7 percent, up from 50.9 percent in 1972; of 4.4 million employees, merchant wholesalers accounted for 77 percent; and of 289,134 firms, 88.1 percent.

Merchant wholesaling is composed mostly of small, competitive, independent business enterprises that serve as a conduit between suppliers and clients. The *1977 Census of Wholesale Trade* graphically portrays the lopsided distribution of firms by number and sales size; 3.6 percent of the firms reported annual sales of $10 million or more and accounted for 59.3 percent of total merchant wholesaler sales; 4.7 percent of the firms reported annual sales between $5 million and $9.9 million and accounted for 11.3 percent of total sales, and 91.7 percent of the firms reported sales of less than $5 million and accounted for 29.4 percent of total sales.

The number of merchant wholesale establishments in the United States expanded from 289,974 in 1972, to 307,264 in 1977, 80.3 percent of the industry total. This 6-percent growth was equally divided between the durable and nondurable components of wholesale trade business. Durable goods establishments make up approximately three-fifths of the total number of wholesale establishments.

Precarious Times Induce Caution

Wholesalers are experiencing a business environment that rigorously taxes their skill and ingenuity. The twin evils of inflation and soaring interest rates have brought ever-rising operating costs; increasing product prices, which are difficult to pass on in full; mounting inventory-financing costs; shortening lines of customer credit; and sluggish, if not slumping, unit sales. Under these pressures, wholesalers are becoming cautious and taking few risks.

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NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS
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1981 Profile

Wholesale Trade

SIC Codes: 50–51

Sales (million $)	1,218,384
Employment (000)[1]	5,412
Number of establishments (1977)	307,264

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[1] Includes establishments in other distributive lines (about 23 percent of total) not defined as merchant wholesalers.

Sources: Bureau of the Census, Bureau of Labor Statistics, and Bureau of Industrial Economics estimates.

The table below reveals some of the problems wholesalers face. A major cause of the industry's sluggish sales is the general rise in product prices. The producer price index for finished goods, which gauges price changes of goods wholesalers buy, has edged up each month. Wholesale firms, attempting to pass on most, if not all, of these price hikes, are meeting sales resistance from customers bent on keeping their inventories low. Retail customers, hampered by their own slow-paced sales, are major contributors to sales slackness in some lines of wholesaling.

Changes in Financial Indicators, Wholesale Trade, First Quarter 1980 Compared with First Quarter 1981

Indicator	*First Quarter*		*Percent change*
	1980	*1981*	
PPI for finished goods			
Inventories (billion $)	94.2	99.3	5.4
Ratio to current assets (x100)	44.8	44.6	
Short-term Borrowing (billion $)	33.8	37.3	10.4
(Retailing)	(13.4)	(15.5)	(15.7)
(All manufacturing)	(31.3)	(29.3)	(–6.3)
Ratio to total assets (x100)	10.9	17.4	
(Retailing)	(13.8)	(13.2)	
(All manufacturing)	(5.4)	(5.1)	
After-tax income (billion $)	4.0	3.9	–1.8
Ratio to net sales (x100)	1.7	1.5	
Ratio to total assets	5.85	5.33	
Ratio to stockholder equity	16.38	15.14	
Stockholders' equity (billion $)	98.4	104.6	6.3
Ratio to total assets (x100)	35.7	35.2	
Ratio to total debt (x100)	1.21	1.16	
Retained earnings (billion $)	72.9	78.3	
Ratio of current assets to current liabilities (x100)	1.55	1.52	
Wholesale business failures	298	335	12.4

Wholesalers are keeping their own stocks lean. Although the value of wholesale inventories was greater in the first quarter of 1981 than in the first quarter of 1980, the increase was about half the rate of inflation, indicating that physical stocks did not increase, only their prices did. In addition, inventories as a percentage of current assets dropped slightly, also signifying inventory restraint.

Inventory financing, which primarily depends upon short-term bank loans, is a critical factor in wholesaling's current squeeze. A firm is granted short-term loans on the strength of its accounts receivable, which usually are about 42 percent of its current assets. Hence, wholesalers need to manage their accounts receivable with great care and skill. Although they have shortened their lines of credit to customers and offered special discounts for prompt payment, in many instances their customers—themselves caught in the slow-sales/inflation squeeze—have been slow to pay. This imposes a financial burden on wholesalers, who must honor their own credit obligations at interest rates that at times have exceeded 20 percent.

Short-term bank loans for all wholesale firms (merchant wholesalers; manufacturers' sales branches and offices; and agents, brokers, and commission merchants) advanced 10 percent in the first quarter of 1981 compared to the same quarter in 1980. Retail firms' short-term borrowings also were greater, but they stood at a much lower absolute level than those of wholesalers. Borrowings by all manufacturing firms declined slightly. The ratio of short-term loans and current installments to total assets further portrays the money pinch on wholesalers. This ratio rose between first-quarter 1980 and first-quarter 1981, while that for retailing and for manufacturing fell.

The high cost of money, together with a sluggish sales market, is hurting the wholesale industry's profitability. The industry's after-tax income was lower in the first quarter of 1981 than in the same period of 1980, as were the ratios of after-tax income to net sales, to total assets, and to stockholders' equity. Stockholders' equity in wholesale corporations increased modestly during this time, but the ratios of equity to total assets and to total debt declined. Retained earnings advanced, however, suggesting that companies need to strengthen their cash positions.

The rising number of wholesale business failures—though not alarming—clearly accents the industry's straitened circumstances. Between 1979 and 1980, the number of failures jumped from 908 to 1,284. Failures in the first quarter of 1981 were 12.4 percent more than in the comparable period in 1980.

New Tax Law Will Promote Capital Investment

Caught between customer sales resistance and rising product prices, wholesalers now look to the new Economic Recovery Tax Act to improve their financial and investment prospects. Under the new tax law, wholesale distribution firms will be eligible for these major benefits: accelerated depreciation on fixed assets, particularly structures: estate tax reform, which will affect family-owned firms; inventory valuation improvement; corporate income tax rate reductions; an increase in the amount of used machinery eligible for investment tax credit; and in increase in tax credit for rehabilitating older buildings and for accumulated earnings.

The value of wholesale industry fixed assets in 1980 was $312.8 billion, so depreciation reform is a critical component of the tax measure. Before enactment of the new law, firms could write off warehouses over a 37- to 60-year period. Under the new plan, they can depreciate structures in 15 years. Translated into cash flow, the new depreciation system will allow a wholesaler-distributor to recover $600,000 or more of a $1-million warehouse investment over the 15 years.

Firms owning or wishing to purchase an older structure may take advantage of an increased tax credit for rehabilitated buildings. Structures 30 or more years old will qualify for a 15-percent credit (raised from 10 percent) owners of structures 40 or more years old will receive a 20-percent credit, and owners of buildings officially designated "historic" will benefit from a 25-percent credit.

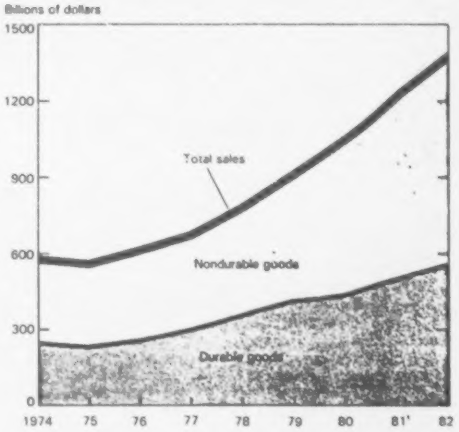
The new law also provides for $10,000 immediate write-off for newly acquired depreciable property. Moreover, firms may now depreciate machinery and equipment in 5 years, rather than the previous 7 or 8, and light vehicles, in 3 years. The new law also provides for a 10-percent investment tax credit for machinery and equipment. For a $100,000 investment in warehouse equipment, a wholesaler using the 200-percent declining balance method phased in over 5 years and taking the 10-percent investment tax credit could increase cash flow by about $36,000 compared to the previous law. In addition, wholesalers will receive investment tax credits of up to $125,000 for used machinery purchased between 1981 and 1984. From 1985 and beyond, the tax credit allowance will increase to $150,000. This will especially benefit wholesaler-distributors because used equipment often is the only equipment they purchase. Liberalizing the investment tax credit for equipment purchases will encourage firms to purchase new equipment, which will also stimulate the market for used equipment.

Of prime importance to closely held family-owned corporations, which abound in the wholesale industry, is the estate tax reform. Under the new law, the estate tax exemption is raised from $175,000 to 600,000, with a 4-year phase-in period. Furthermore, the unlimited marital deduction will permit owners to transfer their entire estates to surviving spouses, tax free. Finally, an easing of the estate tax payment requirements will provide surviving family members holding a 35-percent or more interest in the business a 5-year payment deferral, then 10 years in which to remit the tax.

To the wholesale industry, the biggest break for realizing immediate cash flow benefits is the reduction of corporate income tax rates. The tax reduction also will greatly improve the industry's ability to finance working capital. Firms with less than $50,000 in net taxable income will receive a 2-percent overall tax rate reduction phased in over the 2-year period 1982–83. The rate for the first $25,000 in net taxable income will fall from 17 percent to 15 percent, and the rate on the next $25,000 in net taxable income will fall from 20 percent to 18 percent.

Seventy-eight percent of all merchant wholesale firms are corporations. Industry sources estimate that these firms' capital expenditures in 1982 will approximate $8.8 billion. Under the new tax legislation, they would depreciate their assets at $8.7 billion, an increase of 40 percent compared to the old law. In addition, corporate wholesalers had projected their 1982 income tax at $8.9 billion; with the new tax changes, the projected estimate is scaled down to $5.5 billion, a 38-percent savings.

Merchant Wholesalers' Sales of Durable and Non-Durable Goods



¹Estimated
Source: Bureau of the Census and Bureau of Industrial Economics

Wholesale Trade (SIC 50 & 51): Trends and Projectors 1972-82

In Millions of Current Dollars

SIC		1972	1977	1978	1979	1980	1981	Compound Annual Rate of Growth 1972-81	1982	% Change 1981-1982
50–51	Merchant Wholesalers total	353,919	671,844	776,577	915,163	1,043,886	1,218,384	14.7	1,378,963	13
50	Durable goods, total [3]	159,998	297,291	354,163	410,079	438,349	499,718	13.5	559,684	12
501	Motor vehicles, equipment	29,909	55,090	66,347	75,507	81,629	93,873	13.6	107,954	15
502	Furniture, furnishings	6,788	11,117	12,561	13,940	15,580	17,428	11.1	19,171	10
503	Lumber, other construction materials	16,914	27,583	33,744	37,122	33,245	34,658	8.3	36,737	6
506	Electrical goods	18,848	30,351	36,153	41,750	46,436	53,764	12.4	60,753	13
507	Hardware, plumbing equipment	13,328	19,902	23,325	26,814	27,623	31,297	10.0	34,740	11
508	Machinery, equipment, supplies	42,497	85,705	99,244	115,952	129,048	150,083	15.1	174,096	16
51	Nondurable goods, total [3]	193,921	374,553	422,414	505,084	605,447	718,666	15.7	819,279	14
511	Paper, paper products	8,216	15,015	17,032	19,271	21,643	25,106	13.2	28,621	14
512	Drugs, sundries	6,536	10,084	10,724	11,593	13,051	15,792	10.3	18,003	14
513	Apparel, piece goods	13,433	17,905	21,355	23,009	25,790	28,519	8.7	31,371	10
514	Groceries and related products	64,082	111,566	125,774	136,529	149,889	169,524	11.4	193,257	14
517	Petroleum and petroleum products	N.A.	59,493	66,876	103,031	158,190	221,466	N.A.	254,686	15
518	Beer, wine, spirits	15,423	22,446	25,873	29,196	31,697	34,550	9.4	37,660	9
	Total employment (000) [4]	4,133	4,708	4,969	5,204	5,281	5,387	3.0	5,549	3

[1] Estimated by Bureau of Industrial Economics.
[2] Forecasts.
[3] Because some trade lines are excluded, wholesalers by type of business do not add to durable and nondurable totals.
[4] Includes employees in other distributive lines (about 23 percent of total) not defined as merchant wholesalers.
N.A. — Not available.

Employment and Earnings Grow Slowly

The total workforce in wholesaling continued to increase in 1981, but more slowly than in the prior year. Employment reached approximately 5.4 million, a gain of 2 percent. Employment levels have been relatively stable over the years for two reasons: (1) the customers of most wholesale lines are so diverse that a slump in one customer-market does not hurt a wholesale firm's business enough to compel it to lay off many employees; (2) during business downturns, most wholesale firms tend to reduce workweeks rather than lay off people.

During 1981, the average workweek was 38.5 hours, about the same as in the preceding year. Average hourly earnings increased 7.9 percent, a slightly higher rate than in 1980, to $7.52 an hour.

In the decade of the 1980's, the service trades sector is expected to continue its share of all jobs in the labor market. Wholesale trade, however, is projected to show only modest relative gains in employment.

Computerization Enhances Productivity

Wholesalers are increasingly computerizing their warehouse and office operations in order to trim operating costs, enhance productivity, and improve cash flow. With the aid of the computer, wholesalers not only improve their own functions but also improve the day-to-day operations of their clients by making sure new orders arrive and providing quick and dependable service.

Computer systems regulate all aspects of warehouse management. For instance, the computer provides order-picking and shipping documents, directs inventory location and stock status, prints invoices, and manages all accounts receivable operations. It also analyzes profits and sales performance. The computer produces reports showing the status of stock turnover to wholesalers' clients.

Squeezed by the combined effects of persistent inflation and sales-resistant markets, wholesalers are constantly seeking ways to control rising inventory costs. Increasingly, they are using computer systems to control inventories. A computerized inventory-control system improves employee productivity and also frees both management and staff for the vital matters of policy, purchasing, selling, and serving customer needs. Climbing inventory costs have compelled wholesalers to manage inventories. The computerized inventory-control system issues accurate information on outgoing and incoming stock and keeps wholesalers posted on which products to discard or expand. Consequently, such a system helps step up stock turnover while assuring that furnishing a needed service to clients; orders can be filled promptly.

Outlook for 1982

Overall, tightened business conditions have induced among merchant wholesalers a cautiousness regarding business prospects in the first half of 1982. Their sales should approximate $1.4 trillion (current dollars) in 1982, rising about 13 percent over their $1.2 trillion level in 1981. Durable goods wholesalers' sales should reach $559,684 billion, up 12 percent, while nondurable goods wholesalers should post sales of $819.3 billion, an increase of 14 percent.

Most of these sales increases can be attributed to upward price changes anticipated during the year. However, some durable lines, such as machinery, equipment, and supplies, which supply defense goods manufacturers, are expected to gain additional volume.

Petroleum suppliers face shrinking demand and leveling prices in 1982. With fewer gallons of gasoline to distribute, wholesalers' sales will decline. This drop in sales could be offset, however, if refineries decide to channel additional quantities of gasoline through independent wholesalers, or if some unforeseen event should trigger a price hike.

Long-Term Prospects

Sharply changing market conditions, triggered by years of rising costs, voltatile interest rates, and a shrinking capital base, will raise a number of issues over the next decade. Dealing with those issues will challenge merchant wholesalers to plan more precisely. For wholesale executives, planning for the years ahead will be as vital as filling customer orders and meeting delivery schedules.

Now and in future years, wholesalers face changes in operating costs, credit terms, working capital, inventory valuation and maintenance, kinds and extent of customer services, energy costs related to vehicle use and warehouse operations, state and Federal regulation, business taxation, technology advancement, market share, product diversification, and acquisition and merger.

As a first step in planning to cope with change, wholesalers must critically examine the efficacy of their business methods under current market conditions and in the light of detectable changes now taking place in the market. Operational or organizational adjustments may be needed to minimize potential loss or to take advantage of an unfolding opportunity. Computerization and market research will aid in spotting trends and gauging the scope and direction of evolving changes. These techniques will help wholesalers shape alternative policies and actions to meet any eventuality.

Long-Range Forecasts Needed

The growing importance to wholesale firms of the planning function has created a need for better forecasts of changing trends and conditions. Responding to this need, the Distribution Research and Education Foundation, sponsored by the National Association of Wholesaler-Distributors, has authorized an accounting and consulting firm to conduct a "forecast" study of the wholesale distribution industry. Results of the study, when published, will provide industry executives across commodity lines with likely wholesale distribution trends. It also will suggest practical programs to help wholesalers prepare for what is ahead—*Abdul Majid, Office of Consumer Goods and Service Industries.*

Additional References

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June 15, 1982

The Honorable
John C. Danforth
United States Senate
460 Russell Senate Office Building
Washington DC 20510

RE: Proposal for a Uniform Federal Procurement System

Dear Senator Danforth:

Our organization, the Society of Real Estate Appraisers, was scheduled to appear as a witness at hearings originally scheduled for May 26, 1982 on the Uniform Procurement System. Since that hearing has been postponed, we have enclosed our written testimony and ask that it be made a part of the hearing record. When the hearing dates have been established later this year, we would appreciate notice, so that we may have an opportunity to testify.

Briefly, we believe that the current legislative proposal, and its predecessors, rely on "low-price bidding" as the key to simplification of the procurement system. While price may be a valid criterion in many instances, we feel that there are significant numbers of procurement actions for which professional qualifications of the provider of the service should be the principal selection criterion. Price should only be a factor after selection and ranking of the qualified offerors. Then, the most qualified offeror should submit a fee proposal for negotiation with the contracting agency for the work to be performed.

In our opinion, the foregoing is appropriate procedure for procurement of services where qualification of the offeror is paramount to price.

The legislative proposal of April 30, 1982, defines "negotiate" as "make without formal advertising". That definition is clearly erroneous and we believe our suggested procedure more nearly fits the traditional definition of "negotiate".

Any legislative changes which simplify current statutes will be implemented by regulation and directives promulgated by the agencies. It is important to mention the conflict between the simplification of the statutes and the myriad of implementing regulations.

Any questions you may have about our organization or our position would be welcome.

Very truly yours,

Jerry S. Dominy

Jerry S. Dominy, SREA, MAI
Chairman
Public Affairs Committee

STATEMENT OF
THE SOCIETY OF REAL ESTATE APPRAISERS
BEFORE THE
SUBCOMMITTEE ON FEDERAL EXPENDITURES, RESEARCH AND RULES
COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

May , 1982

Mr. Chairman and Members of the Subcommittee:

My name is Oren W. Russell, SREA, and I am International President of the Society of Real Estate Appraisers. My home is in Baton Rouge, Louisiana where I am an independent fee appraiser and real estate analyst. With me this morning are William Duerk, SREA General Counsel, and Robert Morin, our staff Vice President and Legislative Counsel. Because of his experience in the area of federal procurement policy, I have asked Mr. Duerk to present our testimony in these proceedings. I am experienced in doing appraisals for some of the federal agencies and I will be pleased to answer any questions which you may have at the conclusion of our statement.

TESTIMONY

Mr. Chairman: Thank you for the opportunity to appear this morning on behalf of the Society of Real Estate Appraisers. The Society applauds the purpose behind the development of a Uniform Federal Procurement System; the commitment to simplifying and streamlining the process and to enhancing competition is welcomed by everyone involved in government contracting.

I would like to make you familiar with the Society and the professionals it represents. The Society of Real Estate Appraisers is the largest independent real estate appraisal organization in the United States, with more than 16,000 members--independent, institutional, corporate and governmental appraisers. The Society was first organized in 1935 and since that time has developed its membership services as well as its services to the profession and the community at large. The Society offers a vast array of educational courses, seminars and publications oriented toward the timely upgrading of our members' appraisal expertise and disseminating updated information among partners. As part of our education program, we offer a graded designation program. An appraiser can attain special designations upon completion of required educational courses, demonstration appraisals and appropriate professionally oriented experience. The designation program benefits the community as it provides the public with a yardstick to measure individual appraisers. In addition, the Society is a disciplining entity.

Members must subscribe to what we believe to be a professionally compelling but enlightened set of ethical constraints contained in our code of ethics and standards of professional practice and conduct. It is perhaps also important to understand that the Society is an independent organization of appraisers and not affiliated with any organization of realtors, brokers, rental agents or lenders; we speak here only on behalf of appraisers, although our comments as of necessity must also relate in a general sense to other groups providing professional, consulting or expert services.

I would like to initially give you some background on the nature of the profession of appraising, and the manner in which the Government uses appraisers.

An appraisal is an estimate or opinion of market value. It is not a prediction but is derived, to some extent, on forecasts of the future. The estimate or opinion of value is the result of logical analysis based upon market data. The examination and analysis of data with regard to a particular property may include financing information such as loan availability and interest rates, leasehold analysis, commercial possibilities, previous sales of similar properties and numerous other factors. To a great extent the accuracy of an appraisal depends on the experience of the appraiser. Proper analysis of the factors, and the knowledge necessary to weigh them correctly is gained only through years of experience in the field. In some states almost anyone could claim to be an appraiser; only one who has experience and training can make an accurate and realistic estimate of value.

Appraisals are made for the purpose of estimating market value, and as such, that market value can be used in various ways. The Federal Government contracts for appraisal services for many reasons. A major use of appraisal services is in condemnation proceedings, to establish property values before a taking and to provide a basis for estimating damages to any remainder after the taking. The appraiser's estimate of value in condemnation cases forms the basis for the government's calculation of the payment to be made to the private landowner. Appraisers act as expert witnesses in condemnation hearings, and their opinions as well as their reputations and qualifications are subject to cross-examination and attack. The government also contracts with appraisers for a number of purposes special to the Government such as appraisal of leases held by the United States, appraisal of properties under Housing and Urban Development programs, appraisals of property for thrift and banking regulatory agencies, and other real estate oriented agency programs.

In recent years the current practice in the procurement of appraisal services has varied from agency to agency, but generally it is first necessary for an appraiser to obtain placement on the agency's approved list of appraisers. In that fact lies the basis for many of the problems in the acquisition of appraisal services. Because the existence of a list can raise objections of favoritism, agencies have hesitated to award contracts on a rational basis in terms of acquiring the best services available to the government, but rather have tended to award contracts simply on the basis of who is "the next person in line". Such an approach obviously ignores the importance of selecting a qualified appraiser.

Some agencies, rather than approach the problem from a rotation standpoint will simply accept the lowest bid following submission of proposals. This procedure by its nature results in a propensity to award contracts to the most poorly qualified appraiser. Generally, proposals from highly qualified appraisers will be higher than those from poorly qualified appraisers because highly qualified appraisers have experience in dealing with the complexity of the problem and their proposals will reflect that. At the heart of any appraisal is the research which supports the appraiser's conclusion or opinion. The quality of that research is a function of the time spent gathering and analyzing data. To procure an appraisal on the basis of the low bid ignores the very foundation of the appraisal--the research and resulting analysis of the data collection. The Society believes that competition based on proposals related solely to price is inappropriate with regard to appraisal contracts and with regard to acquisition of other professional, consulting or expert services, and that the competition should be limited between experts of equal competence, knowledge, experience and background.

It is clear that the government would obtain benefits from a reassessment of the current practice in the procurement of these services. In the condemnation area, particularly, past practice has created a serious increase in costs to the government in acquisition of private land for public use. A recent report to Congress by the Comptroller General of the United States which highlighted the problems involved in federal land acquisitions by condemnation was highly critical of the level of competence of the appraisal work in this area; frequently, the report noted, appraisals were done on minimal data and analysis.

Clearly, the problems created by faulty appraisals are wide-ranging. Frequently, an appraisal will need to be updated, to reflect changing market conditions since the date of appraisal. Updating of an accurate and well done appraisal involves a fairly simple task of incorporating factors such as inflation, change in population, and risk. This is an impossible task with a faulty appraisal which has failed to initially incorporate sufficient data for a valid finding of value. The Comptroller General's Report notes that frequently an appraisal that is poorly effected comes out with a low figure. In many instances, the land owner who has selected an appraiser uniquely qualified for the type of property involved, and who finds that his property is appropriately valued at a much higher level, often refuses to sell and the matter goes into litigation. The appraisal done by a qualified appraiser will be recognized as such by the court. The cost of defending lawsuits contesting inadequately prepared appraisals has added considerably to government cost in land acquisitions and has created a huge backlog of cases at the Department of Justice. The Report recommends measures to strengthen the quality of property appraisals and to assure that sound and properly supported evaluations are made. These recommendations stress the need, at every level of condemnation proceedings, to raise the quality of appraisal services and review of appraisal estimates, and to improve the level of qualifications of contractors and staff appraisers alike.

The Society believes that the way to avoid problems in the future similar to those set forth in the Comptroller General's Report is to restructure the acquisition of appraisal and other expert, professional or consulting services in line with the Comptroller General's recommendations. To the extent possible, the Society has attempted to upgrade the standards of its profession through the use of designation and educational programs. We believe that the most beneficial step the government could take would be the development and implementation of minimum qualifications for appraisers. Meeting these minimum qualifications should be a prerequisite to the acceptance of a contractor into the pool of source offerors for selection of contracts.

The acquisition of appraisal and other professional, expert and consulting services should be from selected contractors with established qualifications and, equally important, should be based on factors of professional expertise and technical qualifications. Though price is an important factor, in this area, it should not be dominant, and should be properly the subject of negotiation. Price should be consistent with responsibility for the uniqueness and complexity of the assignment. Because of the professional experience, education and ability that are demanded of a truly able appraiser, these are the factors that the government should look to first. The Society also believes that the particular experience areas and technical qualifications a contract may require should be set forth in the solicitation as the important factors in awarding the contract, and that the contracting officer should have limited discretion to stray from those specified qualification standards. With this general background in mind, the Society would like to comment generally on the substance of the proposal for an Uniform Federal Procurement System; we have also annexed to our written testimony a list of specific suggestions for changes to the proposal.

At this point in the testimony, we would like to bring to the attention of the Subcommittee the discrepancy which exists between the avowed purpose of the legislative proposal under consideration today which is the simplification of the entire federal contracting system and the complicated set of regulations which are currently required to implement the existing statute.

The Declaration of Policy in the amendments to all three affected acts contain a list of purposes to be implemented in the proposals. Many of these directives will be welcomed by Government contractors, and it is the Society's hope that their purpose is fulfilled. The stress, for example, on promotion of small business concerns and the concomitant elevation of the small purchase exemption to $25,000 will certainly benefit individual or small contractors such as appraisers and promote competition in the small purchaser procurement.

The Society believes, however, that the structure of the Declaration of Policy reflects a basic omission in the amendments as a whole. Our emphasis in this testimony has been to the effect that practicality and past experience demands that the procurement process for appraisal services should be reassessed. The changes should incorporate factors in acquiring appraisal and other professional, consulting or expert services on the basis of technical qualifications and professional expertise, with price as a less important factor. Neither the sections of the amendments which change existing law nor the new "Competitive Procurement Test" sections address the need for such a change. In fact, the Test sections overly emphasize procurement based on cost and relegates other factors such as professional experience to a lessor status. Our specific comments in this regard are set forth in the Appendix to our testimony.

Mr Chairman: Again, I thank you for allowing me to express the views of the Society on the proposed procurement system. I hope that the Society's views will be of assistance to you in review of these Amendments and that we can work together in structuring a more efficient and effective Federal Procurement System. If there is any way in which the SREA can be helpful to the members of the Subcommitte or to the staff, please feel free to call upon us. We would be pleased to answer any questions which you have at this time.

Thank you.

Appendix

The Proposal For A Uniform Federal Procurement System: Specific Comments*

Section 301: Declaration of Policy

SREA believes that the Declaration of Policy should contain a policy directive addressing the need for special requirements in the procurement of professional, consulting or expert services. Our suggested amendment is as follows:

". . . the system for procurement of property and services by the Federal Government shall--

provide for the procurement of professional, expert or consulting services on the basis of technical qualifications and professional expertise, as well as price."

Section 309: Definitions

The definition of negotiate proposed by this section is "make without formal advertising." SREA is concerned that this definition will create confusion because there are instances when formal advertising is combined with negotiation. The definition could also be restructured to promote the policies which support negotiation of government contracts. SREA suggests the following definition:

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* Rather than discuss SREA's specific comments with regard to all three sets of parallel amendments to the existing laws, these comments will be based on the amendments to the Federal Property and Administrative Services Act.

"Negotiate" means to confer with a group of offerors, selected through the use of minimum specifications, for the purpose of agreeing on contract price, scope of work and other contract terms.

New Sections in the Act

Section 202: Authority to test new concepts and methods of competition

The introductory paragraph to this section states that the Administrator for Federal Procurement Policy shall be authorized to develop "innovative procurement methods and procedures" to be tested by the agencies. SREA believes that the procedures suggested in this section begin to develop the kind of procurement policy necessary to effect real change in federal acquisition, and that this section should be incorporated into the law with more force than merely that of "test methods of competition."

Section 203: Test parameters

Section 203(b)(1)

SREA encourages the development of test parameters but would suggest some changes in subsection (b) on the evaluation of bids. That subsection lists three bases upon which evaluation is to be made. The first base is essentially that of price. The second base is a price plus "maintenance or operating costs" over the life of the property or service; this base is also a price-related base. The third base calls for evaluation of bids based on "offered price or cost of the property or services and other factors, such as technical or management capability." SREA applaudes the inclusion here of technical capability as a proper factor in evaluation of bids but strongly believes that this basis should be reworded to reflect that certain contracts should be evaluated largely on factors other than price.

Restructuring this subsection is logical when the other two bases are completely oriented toward evaluation based on price. SREA urges in its testimony that procurement of professional, expert or consulting services should be on the basis of technical qualifications and professional expertise. This subsection is the appropriate place to incorporate, at least in the test procurement section, statutory authority for acquiring such services on this basis. SREA's suggested amendment is as follows:

"A bid to supply property or services shall be evaluated based on--

factors including technical qualifications and professional expertise; these factors should be dominant over price, though price is always a factor, in certain procurements such as that for professional, consulting or expert services."

Section 203(b)(2)

SREA is in favor of solicitations which describe the terms and conditions of the proposed contract but would comment that the provision for elimination of discussions when the Government has determined that the solicitation sufficiently describes these terms fails to consider contracts for services such as appraisal services. Because the factors of technical qualification and expertise are so important to procurement of professional, expert or consulting services and vary from contract to contract according to each scope of work, elimination of discussions without at least including minimum qualifications would be inefficient. SREA would suggest an addition to this section, as follows:

"In the evaluation of bids for professional, consulting or expert services, discussions should not be eliminated unless minimum technical qualifications are included in the specifications."

Section 203(c)(3)

SREA's comment with regard to the section on solicitation and award of contracts parallels our comments on the evaluation of bids. While price must of course always be a factor, SREA believes that it is overemphasized in this section, and that the section should at least delineate the type of evaluation factors which may be considered with price, such as technical qualifications.